88-15

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

CHIPMAN FREIGHT SERVICES,
a Division of CHIPMAN CORPORATION,
a California corporation,
Petitioner,

VS.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

BROTHERHOOD OF TEAMSTERS AND AUTO TRUCKDRIVERS
LOCAL 70 OF ALAMEDA COUNTY,
Real Party In Interest.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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& TICHY
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QUESTION PRESENTED FOR REVIEW

Teamsters Local 70 picketed Chipman Freight Services on behalf of various independent contractor subhaulers who did business with Chipman. The object of Local 70's picketing was to alter and/or interrupt the business relationship between Chipman and its subhaulers. The Court of Appeals for the Ninth Circuit ruled that Local 70's picketing did not violate Section 8(b)(4)(i)(ii)(B) of the National Labor Relations Act.

The question presented for review is whether a union may lawfully picket a company on behalf of independent contractors when the union's object is to alter the manner in which the company and the independent contractors do business. In reviewing this question, the Supreme Court must determine:

(1) whether Section 8(b)(4)(B) prohibits union picketing designed to interfere in business relations;

(2) whether union picketing whose object is to disrupt business relations is "primary" and protected if it does not concern an employer's relations vis-a-vis its own employees;

(3) whether union picketing is "primary" because it targets a person who could resolve the union's dispute; and

(4) whether the Ninth Circuit blatantly misinterpreted Congressional intent by ruling that Section 13 of the Act protects union picketing on behalf of independent contractors.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Chipman Freight Services[1] prays that a writ of certiorari issue to review the opinion and judgment of the Court of Appeals for the Ninth Circuit rendered in these proceedings on April 7, 1988.

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[1] Chipman Freight Services is an operating division of Chipman Corporation. Chipman Moving and Storage, an affiliated corporation, is a wholly owned subsidiary of Chipman Corporation.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 843 F.2d 1224. (Appendix A, A-1—A-7.) The opinion of the National Labor Relations Board (hereinafter "the Board" or "NLRB") reviewed by the Court of Appeals is reported at 283 N.L.R.B. No. 57. (Appendix B, A-8—A-35.)

JURISDICTION

The decision of the court below issued on April 7, 1988. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The court below was called upon to interpret Section 8(b)(4)(i)(ii)(B) of the National Labor Relations Act (hereinafter "the Act" or "NLRA"). 29 U.S.C. § 158(b)(4)(i) (ii)(B). This statutory provision is set forth in Appendix C, A-36.

STATEMENT OF THE CASE

A. Nature Of Case And Course Of Proceedings

An NLRB administrative law judge found that Local 70's picketing violated Section 8(b)(4)(i)(ii)(B) because the object of the picketing was to disrupt the business relationship between Chipman and its subhaulers and because Local 70's picketing was not in furtherance of a "primary" dispute. The ALJ ruled that a "primary" dispute concerns an employer's relations vis-a-vis its own employees. The ALJ based his decision upon legislative history and case precedent as well as the Board's decision in *Production Workers Local 707 (Checker Taxi I)*, 273 N.L.R.B. 1178 (1984). (Appendix D, A-37—A-69.)

Subsequently, the District of Columbia Circuit Court of Appeals vacated the *Checker Taxi I* decision. *Production Workers Union of Chicago v. NLRB*, 793 F.2d 323 (D.C. Cir. 1986). (Appendix E, A-70—A-86.) In a decision issued on March 26, 1987, the Board adopted the District of Columbia Circuit's ruling.

Production Workers Local 707 (Checker Taxi II), 283 N.L.R.B. No. 56 (1987). (Appendix F, A-87—A-93.)

On the same day, based upon its *Checker Taxi II* decision, the Board found that Local 70's picketing of Chipman was protected by the "primary" picketing proviso of Section 8(b)(4)(B). On March 27, 1987, Chipman filed a Petition for Review with the Ninth Circuit pursuant to 29 U.S.C. § 160(f). The Ninth Circuit ruled that Local 70's picketing was "primary," regardless of whether the dispute involved an employer's relations vis-a-vis its own employees. The Ninth Circuit reasoned that Section 8(b)(4)(B) prohibits pressure brought to bear only on a person who is "wholly unconcerned" in a union dispute. The court ruled that Chipman was not "wholly unconcerned" in Local 70's dispute because the "sole object" of Local 70's picketing was to force Chipman to change the terms of its independent contractor agreements. The court also concluded that Congress intended Section 13 of the Act to protect union picketing on behalf of independent contractors.

B. Facts Relevant To The Issues Presented

Chipman operates two freight terminals in Oakland, California. Freight is transported to and from the terminals by drivers employed by Chipman, by drivers employed by Chipman's customers, and by independent contractor subhaulers under contract to Chipman. (Appendix B, A-16.) In July 1985, Chipman drafted a new subhaul agreement describing the terms under which its independent contractors would perform services. No independent contractor was allowed by Chipman to continue to perform services for it until the contractor executed a new subhaul agreement. (Appendix B, A-17—A-18.)

In June and July 1985, Teamsters Local 70 conducted a campaign to organize the approximately 400 independent contractor subhaulers in the Port of Oakland vicinity. Local 70 told the subhaulers that Local 70 wanted to represent them in order to improve their rates. (Appendix B, A-18.) Various of Chipman's 22 independent contractors indicated to Local 70 that they wanted to perform services for Chipman, but under the terms of the previous subhaul agreement which had been cancelled by

Chipman. Local 70 offered to assist Chipman's subhaulers and on August 7 began picketing Chipman's Oakland terminals with picket signs reading "Chipman Freight Service—Unfair to Owner Operators—Teamsters Local 70." (Appendix B, A-20—A-21.) Chipman offered to negotiate individually with its independent contractors over the terms pursuant to which they would perform services for Chipman. Local 70 insisted, however, that the independent contractors would meet only as a group and only if Chipman allowed them to return to work under the terms of the cancelled independent contractor agreements. (Appendix B, A-23—A-24.) Local 70 continued picketing until November 15, when the Ninth Circuit enjoined the picketing. (Appendix A, A-2.)

REASONS FOR GRANTING THE WRIT

The central purpose of the NLRA is to preserve the free flow of interstate commerce. To that end, Section 8(b)(4)(B) prohibits union picketing designed to interfere with relations between business entities. Section 8(b)(4)(B) carves out one exception to this restraint upon picketing:

> nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing.

The plain language of Section 8(b)(4)(B), the policies underlying Section 8(b)(4)(B), and precedent from the Second and Seventh Circuits establish that union picketing is protected by this "primary" proviso only if it is directed to an employer's relations vis-a-vis its own employees. As the object of Local 70's picketing was to force a change in the method by which Chipman did business with its independent contractors, and as Local 70's picketing was not directed to Chipman's relations with "employees," Local 70's picketing violated Section 8(b)(4)(B).

The Ninth Circuit found that Local 70 did not violate Section 8(b)(4)(B) because "the core distinction between primary and secondary activities is the neutrality of the entity against which the disputed activity is directed." As Chipman was targeted for picketing because it had the power to resolve Local

70's dispute, the Ninth Circuit ruled that Chipman was party to a "primary" dispute.

The "core distinction" between "primary" and prohibited picketing cannot be reduced solely to the power of the picketed party to resolve the union's dispute. The existence of Section 8(b)(4)(B) is an acknowledgment that unions picket persons who are not parties to "primary" disputes because the persons targeted for picketing can force a resolution of the unions' disputes. Indeed, there would be no point in targeting a person for picketing unless that person could resolve the unions' disputes.

A facile ruling that the "core distinction" of "primary" picketing is the targeted party's ability to resolve the union's dispute conflicts with rulings by the Second and Seventh Circuit Courts of Appeals which define "primary" picketing and with the spirit and rationale of rulings by this Court. Chipman's writ of certiorari must be granted to resolve this conflict. Rules of the Supreme Court of the United States, Rule 17.1(a).

Chipman's writ of certiorari also must be granted because a resolution of the issues in this case will shape the role of unions in the increasing number of industries which utilize independent contractors. Important questions of federal law must be settled by this Court:

> (1) whether Section 8(b)(4)(B) prohibits union picketing designed to interfere with business relations;
>
> (2) whether union picketing designed to interfere in business relations is "primary" if it is not directed at an employer's relations with its employees;
>
> (3) whether union picketing of any person who can resolve a union's dispute is "primary" picketing; and
>
> (4) whether Congress intended Section 13 to protect union picketing on behalf of independent contractors.

Rules of the Supreme Court of the United States, Rule 17.1(c).

A. This Court Must Determine Whether A Union May Interfere In Business Relations By Picketing On Behalf Of Independent Contractors

1. The Plain Language Of Section 8(b)(4)(B) Prohibits Local 70's Interference In Chipman's Business Relations

Section 8(b)(4)(B) provides that it shall be an unfair labor practice for a union:

> (i) . . . to induce or encourage any individual employed by any person engaged in commerce . . . to engage in a strike or a refusal in the course of his employment to . . . transport, or otherwise handle or work on any goods . . . or to perform any services; or
>
> (ii) to threaten, coerce or restrain any person engaged in commerce . . . where in either case an object thereof is;
>
> (B) forcing or requiring any person to cease . . . doing business with any other person . . . . *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing . . . .

The broad statutory language follows the broad legislative intent described in House Conference Report No. 510 on H.R. 3020:

> Under clause (A) [since 1959 designated as Section 8(b)(4)(B)] strikes or boycotts, or attempts to induce or encourage such action, were made unfair labor practices if the purpose was to force an employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of another, or to cease doing business with any other person. *Thus it was made an unfair labor practice for a union to engage in a strike against employer A for the purpose of forcing that employer to cease doing business with employer B.*

I Leg. Hist. LMRA 547. Substantially the same statement was made in Senate Report No. 105 on S.1126, the Senate bill. *See* I Leg. Hist. LMRA 428.

Recognizing the breadth of the statute, this Court described the scope of Section 8(b)(4)(B) in *ILA v. Allied International*, 456 U.S. 212 (1982) as follows:

> In the plainest of language [Section 8(b)(4)(B)] prohibits 'forcing . . . any person to cease . . . handling . . . the products of any other producer . . . or to cease doing business with any other person.'

Id. at 225.

The plain language of Section 8(b)(4)(B) describes the parameters of union conduct which violates the Act:

> Certain acts, when done for a specified object, are proscribed. The mere fact that the language of this Section comprehends the familiar pattern of a secondary boycott in the customary sense does not inexorably dictate the conclusion that it excludes all variations from those patterns. Where, as here, act and object fall comfortably within the letter of the statute, the Board's hand is to be stayed only upon a persuasive showing that they are beyond its spirit.

National Maritime Union v. NLRB (Delta Steamship Lines), 346 F.2d 411, 417 (D.C. Cir. 1965), *cert. denied*, 382 U.S. 840 (1965).

The conduct of Local 70 in the instant case falls comfortably within the plain language of Section 8(b)(4)(B). Local 70 picketed Chipman in order to force Chipman and its independent contractors to "cease doing business" by forcing Chipman to alter its contractual relationship with its independent contractors.[2] It is

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[2] It is well settled that the term "cease doing business" includes forced changes in the method of doing business as well as total cessation of business. *NLRB v. Operating Engineers, Local 825 (Burns and Roe)*, 400 U.S. 297, 304-05 (1971); *Associated General Contractors of California, Inc. v. NLRB*, 514 F.2d 433, 437 n.6 (9th Cir. 1975).

exactly this type of interference with business relations that Section 8(b)(4)(B) is designed to restrain.

2. Section 8(b)(4)(B) Of The National Labor Relations Act Is Designed To Impose The Same Restraint Upon Union Interference In Business Relations As The Common Law Has Imposed Upon Entities Other Than Unions

The declared policy of the National Labor Relations Act is to preserve the free flow of interstate commerce. To do this, Congress limited a union's picketing when the object of that picketing is to disrupt business relations:

> Experience has . . . demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

29 U.S.C. § 151.

Common law prevents interference in the business relations of others by providing remedies for the torts of interference with contractual relations and interference with prospective business advantage. Section 8(b)(4)(B) merely codifies this restraint upon interference in business relations by certain union picketing.

The Ninth Circuit's ruling undercuts the NLRA's interest in preserving the free flow of interstate commerce because it allows unions to interfere in business relations. Given the plain language of Section 8(b)(4)(B), as well as the system of checks and balances the Act is designed to fulfill, it is nonsensical to interpret Section 8(b)(4)(B) as allowing union picketing designed to interfere in the business relations of two business entities.

3. Section 8(b)(4)(B) Is Part Of The Balance Struck By Congress Among The Interests Of Employees, Businesses, Unions And The Public

The Act is a system of checks and balances Congress devised:

> to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and *proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare,* and to protect the rights of the public in connection with labor disputes affecting commerce.

29 U.S.C. § 141 (emphasis added).

To achieve the ultimate goal of the NLRA—the preservation of the free flow of interstate commerce—Congress struck a balance among the competing interests of employees, businesses and unions. As this Court noted in *NLRB v. Denver Building and Construction Trades Council*, 341 U.S. 675, 687 (1951) Sections 7 and 13 of the Act were designed to safeguard rights of employees. However, other provisions safeguard the rights of businesses and the public by restricting a labor organization's use of pressure tactics. For example, Section 8(b)(6) prohibits a union from coercing an employer to pay for work not performed ("featherbedding"). Section 8(b)(7) prohibits a union from engaging in recognitional picketing for longer than 30 days without filing a representation petition.

Section 8(b)(4)(B) is designed to protect a business entity from a union's picketing when the object of that picketing is to interfere with business relations.[3] To interpret Section

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[3] Picketing, the only union activity at issue in this case, is entitled to less constitutional protection than less coercive forms of union conduct. *Bakery Drivers v. Wohl*, 315 U.S. 769, 776-777 (1942); *ILA v. Allied International*, 456 U.S. 212, 226 (1982).

8(b)(4)(B) as allowing union picketing on behalf of independent contractors, where the union's object is to interfere with relations between business entities, would pose an enormous threat to interstate commerce because unions would be subject to none of the checks and balances carefully crafted in the NLRA. The ironic result would be that a business would have the protection of NLRA procedures where the union was picketing on behalf of its employees but no such protection where the union pickets on behalf of independent contractors. Similarly, because they are not employees, independent contractors who do not wish Local 70 to picket on their behalf have no protection under the Act to stop Local 70.

If this Court determines that Section 8(b)(4)(B) sanctions Local 70's picketing, there will be no statutory system of checks and balances to protect the independent contractors or Chipman from abuses in Local 70's conduct. The purpose and policy of the Act is to balance the interests of employees, businesses, unions and the public so as to foster the free flow of commerce. This purpose and policy would be seriously undercut by a finding that Section 8(b)(4)(B) protects Local 70's picketing when no other provision within the Act protects the independent contractors' rights or Chipman's rights.

B. This Court Must Resolve Conflicting Courts Of Appeals Definitions Of "Primary" Picketing Protected By The Proviso Of Section 8(b)(4)(B)

The "primary" picketing proviso of Section 8(b)(4)(B) carves out one exception to the prohibition against union interference in business relations: a union may engage in a "primary strike or primary picketing." The Second and Seventh Circuit Courts of Appeals have defined "primary" picketing as picketing directed at an employer's relations vis-a-vis its own employees. The Second and Seventh Circuits also have ruled that union picketing is not "primary" simply because it targets a person who has the ability to resolve the union's dispute. Local 70 admits that its dispute with Chipman concerns the terms under which Chipman utilizes bona fide independent contractors. However, the Ninth Circuit rejected the definition of "primary" picketing set forth by the Second and Seventh Circuits and ruled that Local 70's picketing

was "primary" because Chipman was the target of Local 70's picketing. This conflict in the federal courts of appeals must be decided in favor of Chipman because to define picketing not directed toward the wages, hours and working conditions of employees as "primary" is inconsistent with statutory mandate and frustrates the purpose and policy of the NLRA.

1. The Second Circuit Interpretation

In *NLRB v. Local 3, IBEW*, 542 F.2d 860 (2d Cir. 1976), the union ordered its members to walk off school board job sites to force the school board to award bids to union contractors. The Second Circuit found that the union's activity violated Section 8(b)(4)(B):

> The work stoppage on School Board job sites by Local 3 had nothing whatever to do with management-employee relations between the School Board and Local 3—indeed, it could not, since the School Board has no collective bargaining agreement with Local 3 and is responsible for no aspect of the union's working conditions or wages. . . . *Local 3's arguments that the School Board was not a 'neutral' employer because the Board (1) was not "wholly unconcerned" in the controversy,* and (2) might have hired union members directly if it abandoned the bid and award system, *are entirely without merit.*

Id. at 865 (emphasis added).

2. The Seventh Circuit Interpretation

In *Illinois Bell Telephone Co.*, 235 N.L.R.B. 555 (1978), *enforced, Local 399, IBEW v. NLRB*, 601 F.2d 593 (7th Cir. 1979), the State of Illinois decided to repair Bell Telephone equipment with its own employees. The union which represented Bell's employees picketed the State's facilities in order to protest the State's reassignment of the work. The State of Illinois was not "wholly unconcerned" in the continuing dispute. Indeed, it was the only party which could have resolved the dispute because Bell had nothing to do with the assignment of work. Nevertheless, the Board found that the picketing was not protected "primary" activity because the union's "picketing *was not addressed to the*

State's labor relations vis-a-vis its own employees but was designed to satisfy [the union's] objectives in its relationship with Illinois Bell. Therefore, the picketing violated Section 8(b)(4) of the Act." 235 N.L.R.B. at 555 (emphasis added). The Seventh Circuit enforced this ruling. *Local 399, IBEW v. NLRB*, 601 F.2d 593 (7th Cir. 1979).

3. The Ninth Circuit's Interpretation

The Ninth Circuit ruled that Chipman was a party to a "primary" dispute because of Chipman's ability to resolve the dispute. As Chipman was not "wholly unconcerned" in Local 70's dispute, the court reasoned that Local 70's picketing did not violate Section 8(b)(4)(B).

Local 70's picketing did not concern any employees of Chipman. Rather, the picketing was intended to alter the manner in which Chipman and its independent contractors did business. Chipman's status as a "target" of Local 70's picketing because of its ability or inability to resolve Local 70's dispute is of no consequence to this case. As the Second Circuit specifically ruled in *NLRB v. Local 3, IBEW*, it is "entirely without merit" to argue that a business must be "wholly unconcerned" in a union's dispute to be protected under Section 8(b)(4)(B). The Ninth Circuit's ruling that a party must be "wholly unconcerned" in a union's dispute to be protected by Section 8(b)(4)(B), therefore, conflicts with rulings in the Second and Seventh Circuits and must be overturned.[4]

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[4] The Ninth Circuit's decision in this case parallels the ruling of the District of Columbia Court of Appeals in *Production Workers of Chicago v. NLRB*, 793 F.2d 323 (D.C. Cir. 1986). The *Production Workers* ruling cannot be reconciled with this Court's "touchstone" test of "primary" activity as conduct "addressed to the labor relations of the contracting employer vis-a-vis his own employees." *National Woodwork Manufacturers Ass'n v. NLRB*, 386 U.S. 612, 645 (1967). A remarkably similar failure to apply the *National Woodwork* test was rejected by this Court in *NLRB v. Pipefitters*, 429 U.S. 507 (1977), in which this Court rejected the District of Columbia Circuit's analysis and ruled that the ability of the subcontractor to resolve the union's dispute was unimportant because the object of the union's conduct was not to affect the labor

C. This Court Must Review The Ninth Circuit's Decision As It Conflicts With The Rationale Of This Court In NLRB v. ILA

This Court has specifically considered "primary" activity under the Act and stated:

> The relevant inquiry . . . is whether . . . the union's efforts are directed at its own employer on a topic affecting *employees' wages, hours or working conditions* that the employer can control, or instead, are directed at affecting the business relations of neutral employers and are 'tactically calculated' to achieve union objectives *outside the primary employer-employee relationship.*

NLRB v. ILA, 473 U.S. 61, 81 (1985) (citing *National Woodwork Manufacturers Ass'n v. NLRB*, 386 U.S. 612, 644-45 (1967)) (emphasis added); *NLRB v. Pipefitters (Austin Co.)*, 429 U.S. 507, 528, n.16 (1977). This Court has not yet considered the application of *NLRB v. ILA*'s rationale to the "primary" picketing proviso. The instant case presents squarely to this Court the opportunity to elucidate its decision in *NLRB v. ILA* and address in specific terms the ambit of the "primary" picketing proviso.

The dispute in the present case cannot be "primary" within the meaning of the proviso because it does not concern employer-employee relations. When Congress amended Section 2(3) of the Act in 1947 to exclude independent contractors from the definition of "employee," it intended to give effect to the difference between the employer-employee relationship and the relationship between independent contractors and the purchasers of their services.

Congress' desire to protect the rights of employees does not extend to independent contractors. In 1947, Congress amended the Act to delete independent contractors from those accorded the protection of the Act. This amendment was Congress' response to *NLRB v. Hearst Publications*, 322 U.S. 111 (1944),

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relations of the subcontractor vis-a-vis his own employees. *Id.* at 514-15, 531.

which approved a Board decision extending coverage of the Act to independent contractors. Congress found this conclusion an unjustified expansion of the term "employee," noting:

> In the law, there always has been a difference, and a big difference, between 'employees' and 'independent contractors.' 'Employees' work for wages or salaries under direct supervision. 'Independent contractors' undertake to do a job for a price . . . and depend for their income not upon wages, but upon the difference between what they pay for goods, materials and labor and what they receive for the end result, that is, upon profits.

House Report No. 245 on H.R. 3020, *reprinted in* I Leg. Hist. 309. The specific exclusion of independent contractors from the protections of the Act establishes that a union's activities on behalf of independent contractors are not intended to be protected "primary" activity.

In *NLRB v. ILA*, no picketing was involved and it was unnecessary for this Court to apply its standard of "primary" activity to union picketing. In the instant case, however, a union picketed a business on behalf of independent contractors. The Court must now decide whether to apply its *NLRB v. ILA* rationale to union picketing challenged under Section 8(b)(4)(B). Applying the rationale of *NLRB v. ILA*, Local 70's picketing was not protected by Section 8(b)(4)(B)'s primary picketing proviso because it was not directed at a "primary employer-employee relationship" concerning "employees' wages, hours or working conditions."

D. This Court Must Correct The Ninth Circuit's Blatant Misinterpretation Of Congressional Intent

The Ninth Circuit ruled that it was "more probable" that Congress intended Section 13 to protect union picketing on behalf of independent contractors. Section 13 of the Act provides that:

> Nothing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to *strike*, or to affect the limitations or qualifications on that right.

29 U.S.C. § 163 (emphasis added).

Section 501(2) of the Labor-Management Relations Act of 1947 provides the legal definition of "strike":

> The term 'strike' includes any strike or other concerted stoppage of work *by employees* (including a stoppage by reason of the expiration of a collective-bargaining agreement) and any concerted slowdown or other concerted interruption of operations by employees.

29 U.S.C. § 142(2) (emphasis added). By the very terms of the Act, Section 13 protects only the right of *employees* to strike. Section 13 of the Act does not guarantee the right of unions to picket on behalf of independent contractors.

The Ninth Circuit reasoned that Section 13 applies to union picketing on behalf of independent contractors because the term "labor dispute" is defined in another provision of the Act as any controversy "regardless of whether the disputants stand in the proximate relation of employer and employee." 29 U.S.C. § 152(9). However, the term "labor dispute" does not appear in Section 8(b)(4)(B). The presence of a "labor dispute," as that term is defined by the Act, bears no relevance to the issue of whether union picketing violates Section 8(b)(4)(B). As the court noted in *Soft Drink Workers Local 812 v. NLRB*, 657 F.2d 1252 (D.C. Cir. 1980), the Act's definition of "labor dispute" should be construed

> as a definitional provision only, designed to ensure uniform meaning to an important phrase that appears frequently and in very different contexts throughout the statute. . . . [T]he Board was under no obligation to pause at the threshold to identify a conventional labor dispute in this case. *Its task was instead to measure the union's conduct against specific provisions of the Act defining unfair labor practices.*

Id. at 1258 (emphasis added). Because the court determined that the union's picketing in that case was not aimed at the relations of the picketed employer vis-a-vis its own employees, the court ruled that the union's picketing violated Section 8(b)(4)(B) regardless of the "labor dispute" issue.

Neither Section 13 nor any other provision of the Act guarantees a union the right to picket on behalf of independent contractors. As independent contractors and unions who act on their behalf enjoy no Section 13 rights, there can be no tension between the rights granted in Section 13 and the limitation set forth in Section 8(b)(4)(B). Accordingly, the Ninth Circuit erred by ruling that Section 13 protects Local 70's picketing on behalf of Chipman's independent contractors. This Court must correct the Ninth Circuit's misinterpretation of Congressional intent.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted to decide important questions of federal law, to resolve conflicts in the appellate courts and to correct the Ninth Circuit's misinterpretation of Congressional intent.

DATED: July 1, 1988.

Respectfully submitted,

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Appendix A

Chipman Freight Services, Inc.,
a subsidiary of Chipman Corporation,
a California corporation, Petitioner,

v.

National Labor Relations Board,
Respondent,

and

Brotherhood of Teamsters and Auto Truckdrivers
Local 70 of Alameda County,
Real Party in Interest.

No. 87-7135.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Oct. 8, 1987.

Decided April 7, 1988.

George J. Tichy, II, Littler, Mendelson, Fastiff & Tichy, San Francisco, Cal., for petitioner.

Charles Donnelly, N.L.R.B., Washington, D.C., for respondent.

On Appeal from an Order of the National Labor Relations Board.

Before Fletcher, Farris and O'Scannlain, Circuit Judges.

O'Scannlain, Circuit Judge:

Chipman Freight Services ("Chipman") appeals from an order of the National Labor Relations Board ("Board" or "NLRB") determining that a "primary" labor dispute existed between Chipman and Teamsters' Local 70 ("the Union") such that the Union's picketing on behalf of independent contractors against Chipman did not violate section 8(b)(4)(B) of the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* ("NLRA").

BACKGROUND

Chipman transports cargo in and out of its terminals using drivers who are employed by it or its customers or who are independent contractor subhaulers whose services are terminable at will by either party.

In July 1985 Chipman canceled its outstanding subhaul agreements and proposed a new agreement that would substantially change the terms on which it did business with the independents. Four of the twenty-two independents entered into the new agreement. At the time, Teamsters' Local 70 was trying to organize all of the independent subhaulers in the area. Some of those used by Chipman attended Union meetings; two signed cards authorizing the Union to represent them.

At a meeting with Union representatives on August 7, some of the independents voted to picket Chipman to reinstate the old subhaul agreement; Local 70 then began picketing Chipman's terminals in their support.

Picketing continued until November 1985, when this court issued an injunction against it, pending an appeal of the decision of the U.S. District Court for the Northern District of California in *Scott v. Teamsters' Local 70,* 633 F.Supp. 121 (N.D. Cal.1985), that denied a temporary injunction of Local 70's picketing. The appeal in that case was dismissed as moot after the NLRB's final order dismissing Chipman's complaint was issued in this case.

STANDARD OF REVIEW

The decision of the NLRB should be upheld if the NLRB correctly applied the law and if there is substantial evidence on the record as a whole to support its findings of fact. *NLRB v. International Longshoremen's Ass'n,* 473 U.S. 61, 78-79, 105 S.Ct. 3045, 87 L.Ed.2d 47 (1985). In addition, the court should yield to the NLRB on its "reasonably defensible" interpretations of the National Labor Relations Act. *Ford Motor Co. v. NLRB,* 441 U.S. 488, 497, 99 S.Ct. 1842, 1849, 60 L.Ed.2d 420 (1979).

ANALYSIS

I

Chipman argues that Local 70's picketing is forbidden by the plain language of section 8(b):

> It shall be an unfair labor practice for a labor organization or its agents . . . (4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce . . . to engage in[ ] a strike . . . or (ii) to threaten, coerce, or restrain any person engaged in commerce . . . where in either case an object thereof is . . . (B) forcing or requiring any person to . . . cease doing business with any other person . . .
>
> *Provided,* [t]hat nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing.

29 U.S.C. § 158(b). The validity of its claim thus hinges on a finding that the strike by Local 70 is not a "primary strike" protected by the proviso. But section 8(b)(4)(B) nowhere defines a protected primary strike in terms of the employer-employee relation; the term has been given meaning only by judicial decision and reference to the legislation's history and that meaning has often proved elusive. *See, e.g., National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612, 645, 87 S.Ct. 1250, 1268, 18 L.Ed.2d 357 (1967).

Chipman thus greatly oversimplifies the issue when it asserts that the court should decide the case solely on the basis of the plain language of the section.

II

Chipman presents three arguments in support of its claim that Local 70's picketing against Chipman is not protected by the "primary" picketing proviso in section 8(b)(4)(B). It argues, first, that the provisions of the NLRA were designed to protect only the rights of *employees,* not independent contractors; second, that a strike as defined by the LMRA is a work stoppage by

employees; and, third, that a primary strike concerns only the wages, hours, or working conditions of *employees.*

The first argument has some persuasion. In the definitional section of the Act, 29 U.S.C. § 152(3), Congress explicitly amended the term "employee" to exclude "any individual having the status of an independent contractor" in response to a Supreme Court decision that extended the Act's general coverage to independent contractors. *See NLRB v. Hearst Publications,* 322 U.S. 111, 64 S.Ct. 851, 88 L.Ed. 1170 (1944); H.R.Rep. No. 245 on H.R. 3020 at 18 (April 11, 1947). It is true that, by retaining independent status, the subhaulers lose many of the protections of the Act. However, circumscription of the scope of the Act's protections is not synonymous with an expansion of its prohibitions. Section 13 of the Act makes clear that Congress intended to place only a narrow limitation on the power to strike:

> Nothing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

29 U.S.C. § 163.

> § 13 is a command of Congress to the courts to resolve doubts and ambiguities [in Section 158] in favor of an interpretation . . . which safeguards the right to strike . . . .

NLRB v. Drivers Local 639, 362 U.S. 274, 282, 80 S.Ct. 706, 711, 4 L.Ed.2d 710 (1960). Again, the section itself makes no reference to limiting its application to the employer-employee relation.

III

Chipman has constructed a textual argument by reading section 13 in conjunction with the definition of a "strike" from the Labor-Management Relations Act of 1947, as a work stoppage "by employees." *See* 29 U.S.C. § 142(2). But this argument would have it that a union can never act on behalf of anyone but statutory employees. In light of precedent and other parts of the NLRA emphasizing the importance of the right to strike, we find this an unduly narrow reading of the Act. For purposes of the

subchapter in which section 8(b) is found, a " 'labor dispute' includes any controversy . . . regardless of whether the disputants stand in the proximate relation of employer and employee," 29 U.S.C. § 152(9), suggesting that the drafters did not intend to limit the application of the section so greatly. It seems more probable that they intended to allow unions to act on behalf of other parties to labor disputes, subject to the same general strictures.

IV

Chipman argues that a protected primary activity is one concerning only the wages, hours, or working conditions of employees. For support, it cites the "touchstone" test promulgated by the Supreme Court in *National Woodwork*: "whether the agreement or its maintenance is addressed to the labor relations of the contracting employer vis-a-vis his own employees." 386 U.S. at 645, 87 S.Ct. at 1268.

As that Court admitted, it is not always a simple test to apply. *Id.* Also, the exact wording of the test can be deceptive when removed from the context of that case. In *National Woodwork*, the Court considered whether a union's strike against a general contractor who used premachined doors instead of those fitted by union carpenters on the jobsite was a secondary strike in violation of section 8(b)(4)(B). Recognizing that the core concept of the section was aimed at preventing "pressure tactically directed toward a neutral employer in a labor dispute not his own," *id.* at 623, 87 S.Ct. at 1257 the Court held that the boycott was not an unfair labor practice because it related to the working conditions of the jobsite carpenters. The Court's definition of a "primary dispute" focused generally on the directness of the union's grievance and the ability of the boycotted employer to control its resolution, but was by no means clear-cut: "The determination whether . . . Section 8(b)(4)(B) [was violated] cannot be made without an inquiry into . . . all the surrounding circumstances." *Id.* at 644, 87 S.Ct. at 1268. The Court did not consider a distinction in its holding should one of the parties to the dispute not be a statutory employee, so that we would distort that Court's decision by placing undue emphasis on the particular words of the "touch-

stone" test. Rather, we look to the basic distinction drawn by *National Woodwork* between a strike against a primary disputant and one against an unoffending neutral.

V

Chipman claims that the Board's reliance upon the decision in *Production Workers Local 707 v. NLRB,* 793 F.2d 323 (D.C.Cir.1986), is misplaced. We disagree. In *Production Workers,* the Board had found that a union's picketing of taxi companies on behalf of independent contractor drivers was a secondary boycott and was therefore prohibited by section 8(b)(4)(B). The Board reasoned that, even though the picketing was not directed toward a neutral employer, it was prohibited because section 8(b)(4)(B) is an "intentionally broad" provision whose protections do not extend to parties who are not statutory employees. *Production Workers Union of Chicago and Vicinity, Local 707,* 273 N.L.R.B. 1178, 1180-81 (1984). On appeal, the D.C. Circuit overturned the Board's decision, holding that the Board had applied the wrong standard, and remanded for application of the correct standard: "[S]ection [8(b)(4)] does not exclude union involvement in all picketing by independent contractors; rather, its proscription is limited to picketing against neutral parties." 793 F.2d at 332-33. On remand, the Board dismissed the cab companies' complaint, finding that they were not neutral parties. *Production Workers Union of Chicago and Vicinity, Local 707,* 283 N.L.R.B. No. 56 (March 26, 1987). On the same day, the Board, perceiving *Production Workers* to control this case as well, issued its decision against Chipman. *Brotherhood of Teamsters, Local 70,* 283 N.L.R.B. No. 57 (March 26, 1987). Without repeating here the D.C. Circuit's thoughtful analysis of section 8(b)(4)(B)'s legislative history and Supreme Court precedent, 793 F.2d at 328-31, we concur with its conclusion that the core distinction between primary and secondary activities is the neutrality of the entity against which the disputed activity is directed: "Section 8(b)(4) was designed to prohibit only pressure brought to bear on 'a third person who is wholly unconcerned in the disagreement,' whether that pressure is called a 'secondary boycott' or 'secondary activity.' " *Id.* at 328 (citing 93 Cong.Rec. 4198 (1947) (remarks by Senator Taft on section 8(b)(4)).

Chipman is clearly not a neutral third party, because agreements it attempted to impose upon the independent subhaulers are the sole object of the picketing.

Chipman's efforts to undermine *Production Workers* fail. It first attempts to distinguish the all but identical facts in *Production Workers* from those presented here: in the former, the union represented all of the independent contractors; but here, four of Chipman's subhaulers had agreed to do business under the new contract. This is a distinction without a difference: although Local 70 may not picket against the other subhaulers, neither does the NLRA require that the support a union obtains from those it represents be unanimous. *See,e.g., Precision Striping, Inc. v. NLRB,* 642 F.2d 1144, 1147 (9th Cir. 1981) (union must obtain majority support).

Chipman then suggests that *Production Workers* was wrongly decided, citing an earlier case from that circuit in its support. In *Soft Drink Workers Local 812 v. NLRB,* 657 F.2d 1252 (D.C.Cir.1980), a union violated section 8(b)(4)(B) by picketing a distributor of nonlocal products to enhance the job opportunities of union members at local plants, *id.* at 1260; its picketing was thus "tactically calculated to satisfy union objectives elsewhere." *National Woodwork,* 386 U.S. at 644, 87 S.Ct at 1268.

The *Soft Drink Workers* decision itself set forth two requirements for a finding of an unfair labor practice by a union: (1) the challenged conduct must have as an object forcing a neutral business to cease doing business with another; and (2) the union must pursue its object by threatening, coercing, or restraining the neutral business. 657 F.2d at 1261. Neither the action complained of in *Production Workers* nor that at issue here meets these criteria, and the decision in *Production Workers* is consistent with the precedent in that circuit.

For the reasons discussed above, the order of the National Labor Relations Board dismissing Chipman's complaint is

AFFIRMED.

Appendix B

283 NLRB No. 57

United States of America

Before the National Labor Relations Board

Brotherhood of Teamsters and Auto Truck Drivers, Local 70 of Alameda County, Affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America

and

Chipman Freight Services

Case 32—CC—1025

DECISION AND ORDER

On 27 December 1985 Administrative Law Judge Jerrold H. Shapiro issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Charging Party filed an answering brief. The General Counsel filed limited exceptions and a supporting brief.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs[2] and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The judge found that the Respondent violated Section 8(b)(4)(i) and (ii)(B) of the Act by picketing Chipman Freight Services with an object of interrupting the business relationships between Chipman and its independent contractor subhaulers, but did not violate Section 8(b)(4)(i) and (ii)(B) by picketing

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[1] The Respondent, the General Counsel, and the Charging Party also filed supplemental statements of position.

[2] The Charging Party has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

Chipman with an object of forcing or requiring Chipman to recognize or bargain with the Respondent as the representative of the subhaulers. For the reasons stated below, we find that the Respondent's picketing of Chipman Freight Services with either of these objectives did not violate Section 8(b)(4)(i) and (ii)(B) of the Act. Accordingly, we shall dismiss the complaint.

Chipman uses 22 subhaulers or owner-operators to transport containers to and from the Oakland dock area. The Respondent concedes that the subhaulers are independent contractors and not employees of Chipman. The subhaulers were required to sign a uniform subhaul agreement in order to do business with Chipman. That agreement was subject to immediate cancellation by either party by giving the other party written notice.

In July 1985[3] Chipman drafted a new subhaul agreement to replace the old one. The new agreement specifically states that the subhauler is an independent contractor and not an employee of Chipman. On 29 July Chipman's general manager Tucker notified all the subhaulers that their old subhaul agreements were canceled and told them that they would have to sign the new agreement in order to do business with Chipman. Only two subhaulers signed new agreements 29 July; two others signed 26 August.

In attempting to regain work from Chipman, some of the subhaulers sought the assistance of the Respondent, which had in June and July already begun efforts to organize the approximately 400 owner-operators in the Oakland area.

On 30 July Alex Ybarrolaza, the director of the Teamsters owner-operator division, attempted to convince Tucker to reinstate the old subhaul agreements and to recognize the Respondent as the representative of the owner-operators. Tucker refused.

On 6 August Ybarrolaza wrote to Chipman that the Respondent represented Chipman's subhaulers and enclosed a blank copy of a recognition agreement. He also sent similar letters to other companies in the area.

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[3] All dates are in 1985 unless otherwise indicated.

On 7 August Ybarrolaza met with most of Chipman's subhaulers. He suggested that the subhaulers sign the new agreement but attach a cover letter prepared by the Respondent stating that the agreement does not accurately define the subhaulers' employment status, and it was not the subhaulers' intent to redefine their status. The subhaulers rejected this course of action because they wanted to work under the old agreement.[4] They voted to picket Chipman, and the Respondent agreed to support the picket line until Chipman took back all the subhaulers under the old agreement. On 7 August the Respondent began picketing Chipman with signs reading, "CHIPMAN FREIGHT SERVICES—UNFAIR TO OWNER OPERATORS—TEAMSTERS LOCAL 70."

The four subhaulers who signed new agreements with Chipman have not performed work at Chipman because of the picketing. Some of Chipman's customers have also refused to cross the picket line.

On 13 August Tucker responded to the Respondent's 6 August request for recognition by refusing to recognize the Respondent because the subhaulers are not Chipman's employees, but independent contractors.

On 15 August the Respondent responded that while it would like to gain recognition at Chipman, the picketing was for the sole purpose of returning all Chipman subhaulers to their jobs and not for the purpose of gaining recognition, and that the subhaulers would return to work if Chipman would not require them to sign the new subhaul agreement.

On 16 August Tucker wrote to the subhaulers that he was still interested in meeting with them to negotiate new contracts.

On 22 August Ybarrolaza wrote that the subhaulers had selected a committee of three subhaulers to discuss a new contract with Chipman and that the Respondent would not participate in those discussions that could begin as soon as the subhaulers were allowed to resume work under the old agreement.

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[4] The new agreement, among other things, provided for a different method of compensation.

On 23 August Tucker replied that he would not reinstate the old contracts and that he was not willing to meet with groups of owner-operators because of potential antitrust ramifications.

In finding that the Respondent violated Section 8(b)(4)(B) of the Act by picketing with an object of forcing independent-contractor subhaulers to cease doing business with Chipman, the judge found that the ultimate object was to force Chipman to do business with the subhaulers under the old, rather than the new, subhaul agreement.

The judge rejected the Respondent's contention that the picketing was primary. The judge relied on the Board's decision in *Production Workers Local 707 (Checker Taxi)*, 273 NLRB 1178 (1984) (Checker I)[5] which held that a union is not engaged in primary activity when it brings economic pressure against a company to cause a cessation of business between the company and its independent contractors, where the union has no dispute concerning the company's own employees. The judge concluded that here the Respondent was not engaged in primary activity because the Respondent picketed Chipman to cause a cessation of business with Chipman's independent contractor subhaulers absent a dispute concerning Chipman's employees. Thus, the judge found that the picketing violated Section 8(b)(4)(i) and (ii)(B) of the Act.

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[5] *Checker I* involved taxicab companies that lease cabs driven by independent contractors (LCDs). Some of the LCDs became dissatisfied with the lease arrangements offered by the companies. They approached the union, which formed a "Leased Taxicab Drivers Division" within the union. The union began collecting dues and initiation fees from the drivers, and sought recognition and bargaining from the companies on behalf of the LCDs. When the companies refused to recognize the union, the union and the LCDs began picketing and handbilling at the companies' garages. The picket signs stated that the LCDs were on strike and requested, inter alia, that the drivers refuse to lease cabs until an agreement was signed. The Board found that the picketing violated Sec. 8(b)(4)(i) and (ii)(B) of the Act because picketing on behalf of independent contractors was not lawful primary activity.

Following the issuance of the judge's decision in the instant case, however, the D.C. Circuit vacated the Board's *Checker I* decision and remanded that case to the Board. *Production Workers Union of Chicago v. NLRB*, 793 F.2d 323 (D.C. Cir. 1986). The court disagreed with the Board's premise that Section 8(b)(4) of the Act prohibits union involvement in all picketing on behalf of independent contractors. Rather, the court held that Section 8(b)(4) bars only secondary activity, which the court defined as "union attempts to involve neutral third parties in disputes not their own." 793 F.2d at 327. The court found that the picketing was not unlawful because it was directed against the cab companies, nonneutral parties, who were directly and intimately involved in the underlying dispute. The court remanded the case to the Board for application of the proper standard.

Following the remand, the Board reconsidered its *Checker I* position, and in *Production Workers Local 707 (Checker Taxi)*, 283 NLRB No. 56, issued today (*Checker II*), the Board agreed with the D.C. Circuit that Section 8(b)(4) of the Act prohibits only picketing against neutral parties, those "wholly unconcerned in the disagreement." 793 F.2d at 328. Applying that standard to the facts in *Checker*, the Board found that because the underlying dispute was with the cab companies, the cab companies are not neutrals. Thus, the Board found that the picketing against the cab companies is primary activity and does not violate Section 8(b)(4) of the Act.

We believe that *Checker II* controls the instant case. Here, the complaint alleges that the Respondent violated Section 8(b)(4)(i) and (ii)(B) of the Act by picketing Chipman with an object of interrupting the business relationships between Chipman and its subhaulers and with an object of forcing Chipman to recognize the Respondent as the subhaulers' representative. Chipman, however, is not a neutral party but is directly and intimately involved in the underlying dispute. The subhaulers' dispute was solely with Chipman, and the Respondent's picketing on behalf of the subhaulers was directed against Chipman. As Chipman is not a neutral, the Respondent's picketing against Chipman, with either of the alleged objectives, is primary activity

that does not violate Section 8(b)(4)(B) of the Act. Accordingly, we shall dismiss the complaint.

ORDER

The complaint is dismissed.

Dated, Washington, D.C. 26 March 1987

Wilford W. Johansen, Member

James M. Stephens, Member

Mary Miller Cracraft, Member

NATIONAL LABOR
RELATIONS BOARD

(SEAL)

United States of America

Before the National Labor Relations Board
Division of Judges
Branch Office
San Francisco, California

Case 32—CC—1025

Brotherhood of Teamsters and Auto Truck Drivers, Local 70 of Alameda County, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America

and

Chipman Freight Services

Rony Clements and *Barbara D. Davison*,
for the General Counsel.
Duane B. Beeson and *Kenneth C. Absalom*, on behalf of
Beeson, Tayer & Silbert, for the Respondent.
John M. Skonberg and *Patricia A. Shepherd*, on behalf of
Littler, Mendelson, Fastiff & Tichy, for
Charging Party Chipman Freight Services.
James C. Paras, on behalf of *Morrison & Foerster*,
for Charging Party Sea-Land Services

DECISION

Statement of the Case

Jerrold H. Shapiro, Administrative Law Judge: The hearing in this case held 30 October 1985 was based upon an unfair labor practice charge filed in Case 32—CC—1025 on 7 August 1985 by Chipman Freight Services, herein called Chipman Freight, and an amended complaint issued 4 October 1985 on behalf of the General Counsel of the National Labor Relations Board, by the Board's Regional Director for Region 32, alleging that Teamsters Local 70, herein called Respondent, was engaging in unfair labor practices within the meaning of Section 8(b)(4)(i)(ii)(B) of the National Labor Relations Act, as amended, herein called the Act. The amended complaint, as amended at the hearing, alleges that Respondent violated Section 8(b)(4)(i)(ii)(B) of the Act by picketing at Chipman Freight's facilities and by picketing Chip-

man Freight's trucks at the facility of Sea-Land Services, herein called Sea-Land, with an object of forcing and requiring Sea-Land and other persons to cease doing business with Chipman Freight, and with an object of forcing and requiring Chipman Freight to recognize and bargain with Respondent for the subhaulers with whom Chipman Freight was doing business.[1] Respondent filed an answer denying the commission of the alleged unfair labor practices.

Upon the entire record, from my observation of the demeanor of the witnesses, and having considered the post-hearing briefs filed by the parties, I make the following:

Findings of Fact

I. Jurisdiction

Chipman Freight, a California corporation, is engaged in the transportation and transhipment of freight and operates two terminals in Oakland, California. Its Oakland terminals during a 12-month period material to this case earned more than $50,000 from transporting freight in interstate commerce and as a link in commerce.

Sea-Land, a New Jersey corporation, is engaged in the international and interstate transportation of freight by water and operates a facility in Oakland, California. Its Oakland facility during a 12-month period material to this case earned more than $50,000 from transporting containerized cargo in interstate commerce and as a link in commerce.

During the time material to this case Chipman Freight, at its Oakland terminals, used the services of 22 truckdrivers, who owned their own trucks, to perform drayage and other trucking

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[1] The amended complaint contained an 8(b)(4)(i)(ii)(B) allegation based upon an unfair labor practice charge filed in Case 32—CC—1026 by Sea-Land. The parties at the start of the hearing represented that they had agreed to a settlement of the complaint's allegation encompassed by that charge. Accordingly, I granted General Counsel's unopposed motion to sever the charge in Case 32—CC—1026 from this proceeding and to remand it to the Board's Regional Director.

services. The relationship between Chipman Freight and these 22 owner-operators, who are referred to herein as sub-haulers, will be described in detail *infra*. Respondent admitted for purposes of this litigation that the sub-haulers are independent contractors and not employees of Chipman Freight.

Chipman Freight and Sea-Land are employers engaged in commerce and in an industry affecting commerce within the meaning of Section 2(6) and (7) of the Act and Chipman Freight, Sea-Land, and each of the above-described sub-haulers has been a person engaged in commerce and in operations affecting commerce within the meaning of Section 2(1), 2(6) and 2(7) of the Act.

II. The Labor Organization Involved

Respondent Brotherhood of Teamsters and Auto Truck Drivers, Local 70 of Alameda County, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. The Evidence

Chipman Freight operates two terminals in Oakland, California where it provides warehouse space and facilities for transloading cargo being shipped into or out of the Port of Oakland in marine containers. Freight is transported to and from these terminals by drivers employed by Chipman Freight, by drivers employed by Chipman Freight's customers, and by the independent contractor sub-haulers.

Chipman Freight employs approximately 25 employees at its Oakland terminals, including managerial and supervisory employees. The rank-and-file employees—truck drivers, warehousemen, hostlers, and freight handlers—are represented by the Diversified Transportation Specialist Union. Their terms and conditions of employment are established by a collective-bargaining contract between that union and the employer.

In addition to its employee-drivers, Chipman Freight uses the services of the 22 independent contractor sub-haulers to move containers to and from the Port of Oakland dock area, and in some cases to make deliveries away from the Port of Oakland. Most of these sub-haulers are owner-operators; that is, they own, maintain, and drive their own trucking equipment used to haul containers for Chipman Freight. Five of the sub-haulers, however, own one or more trucks used by Chipman Freight, which are driven by employees of the sub-hauler. Prior to the events in this case all of the sub-haulers, including the owner-operator group, were required to sign a uniform "sub-haul agreement" in order to work for Chipman Freight. This agreement refers to the sub-haulers as independent businesspersons, and obligates them to "provide transportation services for such shipments as [Chipman Freight] may from time to time tender". The drivers' compensation under the agreement was computed on the basis of a percentage of the rates charged by Chipman Freight. The sub-haul agreement was subject to immediate cancellation by either party "by giving the other party written notice".

In July 1985[2] Chipman Freight's General Manager Jon Tucker drafted a new uniform sub-haul agreement to replace the existing one. The new uniform agreement entitled "Sub-haul Agreement With Independent Contractor" changed the existing agreement in two significant respects. The old one was silent about the sub-hauler's independent contractor status, whereas, the new one specifically stated that the signatory sub-hauler was an independent contractor and not an employee of Chipman Freight, and further stated that the sub-hauler would in all respects direct the operation of the equipment he used to perform under the agreement, and described in detail the authority and responsibilities of the sub-hauler in this respect. Also, whereas under the old sub-haul agreement Chipman Freight agreed to pay the sub-hauler 70 percent of the rates charged customers by Chipman Freight, the new uniform agreement proposed that Chipman Freight and the

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[2] All dates hereinafter refer to the year 1985, unless otherwise specified.

signatory sub-hauler negotiate flat rates for the sub-hauler's services according to the particular hauls.

On 29 July Chipman Freight's General Manager Tucker notified each of the company's 22 sub-haulers, that effective immediately their sub-haul agreements were cancelled. On that day and the days immediately following, Tucker met with each of the sub-haulers individually. He showed them a copy of the new uniform sub-haul agreement, explained the company's reasons for changing the old agreement, stated that the terms of the new proposed agreement and rate schedule were negotiable, and offered to negotiate with the individual sub-haulers. Tucker also told the sub-haulers that they would have to sign a new sub-haul agreement before being allowed to do business with Chipman Freight. In fact, none of the sub-haulers were allowed to continue to work for Chipman Freight until they entered into a new sub-haul agreement. Only four of the 22 sub-haulers, at the time of the 30 October hearing herein, had negotiated new sub-haul agreements; Tyrone Searcy Trucking and Max Lopez Trucking on 29 July, Hunter Trucking and Cliffs Trucking on 26 August.

In June and July, prior to 29 July, Respondent's Owner/Operator Division was conducting a campaign to organize the approximately 400 owner-operators in the trucking business in the Port of Oakland and vicinity. Alex Ybarrolaza, the director of Respondent's Owner/Operator Division, was in charge of this campaign. Prior to 29 July Ybarrolaza conducted several organizational meetings which were each attended by between 100 and 200 owner/operators. He told the owner/operators that Respondent wanted to represent them in order to improve their rates and conditions of employment and asked them to sign cards authorizing Respondent to act as their collective-bargaining representative. Some of Chipman Freight's sub-haulers attended these meetings.

On 30 July Ybarrolaza visited Chipman Freight's General Manager Tucker. He told Tucker that the sub-haulers "terminated" by Chipman Freight on 29 July had signed cards authorizing Respondent to represent them. Ybarrolaza asked Tucker to reinstate the sub-haul agreements which were cancelled 29 July and to put all of the sub-haulers back to work. He explained to

Tucker that Respondent was in the process of formulating new proposals or programs for the sub-haulers, which Respondent wanted to discuss with Chipman Freight, but they were not quite ready for presentation and, in the meantime, Ybarrolaza wanted Chipman Freight to return to the "status quo". Tucker responded by advising Ybarrolaza to contact Chipman Freight's attorney.

On 5 August Respondent filed an unfair labor practice charge (Case 32—CA—7414) with the National Labor Relations Board's Regional Office. It alleged that Chipman Freight violated Section 8(a)(1) and (3) of the Act by discharging 18 named individuals on 29 July because of their participation in concerted activities.[3] The 18 individuals named in the charge were, for the most part, the sub-haulers whose sub-haul agreements on 29 July had been cancelled by Chipman Freight. The record reveals, however, that 3 of the 18 were employees of sub-hauler Clifford Reich d/b/a Cliffs Trucking.

On 6 August the director of Respondent's Owner/Operator Division, Ybarrolaza, wrote Chipman Freight that Respondent represented all of its sub-haulers and enclosed for Chipman Freight's signature a blank copy of an "Owner-Operator Division Recognition Agreement". This agreement stated in substance that the signatory company agreed to recognize Respondent as the exclusive bargaining representative of its owner-operator truck drivers based upon the company's acknowledgement that the owner-operators were employees within the meaning of the National Labor Relations Act and that the company also agreed to begin bargaining about the terms and conditions of employment of the owner-operators and to expeditiously conclude the negotiations.

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[3] The Board's Regional Director of Region 32 found the charge to be without merit because the 18 individuals involved were not entitled to the protection of the Act as they were independent contractors. Respondent's appeal to the General Counsel's Office of Appeals was denied for the same reason.

On the morning of 7 August Ybarrolaza met with a majority of Chipman Freight's sub-haulers whose sub-haul agreements had been cancelled. The meeting took place at the sub-haulers' request and was held at Respondent's headquarters. Ybarrolaza suggested that each of the sub-haulers return to work under the terms of the new uniform sub-haul agreement being proposed by Chipman Freight, but that when they signed this agreement that they also give to Chipman Freight a signed copy of a letter which Ybarrolaza had prepared for the sub-haulers' signatures. Ybarrolaza circulated copies of this letter, which reads as follows:

> Gentlemen:
>
> As directed by you, I have signed your "Independent Contractor Agreement." I signed this Agreement in compliance with your directive, which indicated that I would be terminated or no longer allowed to work for you unless I signed this Agreement. This Agreement, however, does contain several misrepresentations and does not accurately define our relationship nor the manner in which your work is performed or allocated. It is not my intention to redefine my present employment status by signing this Agreement.
>
> This letter has been prepared for me by Teamsters Local 70 at my request. I have authorized them to represent me in this matter, and you should contact them if you have any further questions.
>
> Very truly yours,
>
> _____
>
> (Signature)
>
> cc: Alex Ybarrolaza, Teamsters Local 70

Ybarrolaza's recommended course of action was discussed and rejected by the sub-haulers, a majority of whom indicated they wanted to return to work under the terms of the old uniform sub-haul agreement which had been cancelled by the company. Ybarrolaza then indicated that he thought the sub-haulers should vote on whether they wanted to picket. He explained that if they voted in favor of picketing, that Respondent would support the picket line until Chipman Freight took them back to work under the terms of the old sub-haul agreement, and further explained

that the picketing would continue until each of the sub-haulers was put back to work. The sub-haulers voted to picket.[4]

On 7 August Respondent began picketing Chipman Freight's Oakland terminals. The picket signs read: "CHIPMAN FREIGHT SERVICES—UNFAIR TO OWNER OPERATORS—TEAMSTERS LOCAL 70". Also on 7 August through 9 August the pickets followed Chipman Freight's trucks to numerous facilities in the Port of Oakland and picketed with the above described picket signs at a gate reserved for Chipman Freight's trucks at Sea-Land's Port of Oakland facility. On 30 October, the date of the hearing in this case, Respondent's picketing at Chipman Freight's Oakland terminals was still in progress.[5]

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[4] Ybarrolaza and sub-haulers Reich and Levasseur testified about this meeting. The above description of what occurred is based upon Ybarrolaza's testimony. Ybarrolaza's testimonial demeanor was good, whereas, Reich's and Levasseur's was poor. Moreover, Ybarrolaza's testimony was corroborated by Reich's in a number of significant respects, whereas, there was a sharp conflict between Reich's and Levasseur's testimony. Levasseur's testimony that Ybarrolaza suggested the sub-haulers sign the old sub-haul agreement, rather than the new one, was contradicted by Reich, who corroborated Ybarrolaza's testimony in this respect. Likewise, Reich's description of the contents of the cover letter which Ybarroloza suggested that the sub-haulers give to Chipman Freight, corroborates Ybarrolaza's description and contradicts Levasseur's.

[5] On 13 August the Board's Regional Director in Oakland sought a temporary injunction of this picketing under Section 10(1) of the Act in the United States District Court for the Northern District of California, pending disposition of this proceeding. The Regional Director's petition was denied by the court on 22 October. However, the parties in their post-hearing briefs have advised me that on 15 November the Circuit Court of Appeals for the Ninth Circuit issued an Order, pursuant to General Counsel's motion, enjoining Respondent from picketing Chipman Freight or its customers pending an appeal of the district court's order denying injunction or until the Board issued a final decision in the matter, whichever occurred first.

The four sub-haulers, who, as described *supra*, signed new sub-haul agreements with Chipman Freight, have not made any pickups or deliveries for Chipman Freight at the picketed terminals because the employees of these sub-haulers and/or the sub-haulers themselves have refused to cross Respondent's picket lines. Also the record shows that truck drivers employed by Chipman Freight's customers, or by agents of the customers, have refused to cross the Respondent's picket lines at Chipman Freight's terminals to make pickups or deliveries and that this has prompted some of Chipman Freight's customers to threaten Chipman Freight with the loss of their business.

On 13 August Chipman Freight General Manager Tucker rejected Ybarrolaza's 6 August demand that Chipman Freight recognize Respondent as the bargaining representative of Chipman Freight's sub-haulers. Tucker explained to Ybarrolaza that the demand was inappropriate because the sub-haulers were not Chipman Freight's employees, but were independent businessmen.

On 15 August Ybarrolaza wrote Chipman Freight's attorney, in pertinent part, as follows:

> In our telephone conversation of July 30, 1985, and on two other occasions prior to August 3, 1985, we discussed the matter of Chipman Freight Services' termination of its owner-operator drivers, and on each occasion I indicated to you that we were simply asking Chipman Freight Services to return to the status quo that existed on July 29, 1985. That all the Chipman owner-operator drivers be allowed to return to work under the terms and conditions of their respective contracts then in effect. We also outlined this position to Mr. Jon Tucker at Chipman Freight Services Warehouse on July 30, 1985, and this still remains our position.
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> * * * *
>
> In the event you are under the misconception that our position has changed, please be advised that it has not. I specifically told you on August 2, 1985, that while we would like to gain recognition at Chipman it was not required, and

that the owner-operators would be willing to return to work as long as Chipman would not compel them to sign a new "Independent Contractor Agreement," and was willing to accept the return of all of the owner-operators that it had terminated on July 29, 1985; that we would deal with the question of recognition later as our program on behalf of all of the owner-operators operating on the waterfront not designed for just Chipman or any single company, but for all of the companies involved in the hauling of containers. Letters requesting recognition were sent by us to 35 companies who employees, owner-operators or non-owner drivers, have indicated a desire to be represented by Local 70. All these letters were sent out at about the same time. Chipman was the only company picketed. Our picketing Chipman Freight Services is for the sole purpose of returning all of the Chipman owner-operators to their jobs and not for the purpose of gaining recognition.

On 16 August Tucker wrote identical letters to some of the sub-haulers. He informed them, among other things, that Chipman Freight was still interested in meeting with them to negotiate new contracts, that the only substantial change in the contract which it had proposed was in the rates, that this change was favorable to the sub-haulers, and explained that if there were provisions in the new contract which a sub-hauler desired to change, that Tucker would be happy to consider the sub-hauler's proposed changes.

On 22 August Ybarrolaza wrote Chipman Freight's attorney and with respect to Tucker's 16 August letter, in pertinent part, stated:

> We are glad to hear that Chipman is very interested in meeting with the owner-operators, and on our recommendation they have selected a committee of three who would meet with Mr. Jon Tucker to review and discuss a new contract. The owner-operators further indicated that these discussions could begin as soon as Chipman allows all of their owner-operator drivers to return to work and the talks could be held after normal working hours. Teamsters Local 70 would not participate in these discussions. Pending final resolution for a

> new contract, they would also agree to continue to work as they had in the past and under the terms of their respective past agreements and either the old or more favorable rates than Chipman seems to be offering, all of which Local 70 is not a party to.

On 23 August Tucker wrote Ybarrolaza in response to Ybarrolaza's 22 August letter. With respect to Ybarrolaza's proposal concerning the negotiation of a new contract by and between the sub-haulers and Chipman Freight, Tucker wrote the following:

> . . . We are still not willing to return to the prior contracts while we discuss revisions in those contracts. Nor are we willing to meet with groups of owner-operators to discuss rates. As I am sure you are aware, the joint discussion of such rates could have serious anti-trust ramifications for both the company and the owner-operators.
>
> As I said before, we are, however, willing to meet at any time, individually, with the owner-operators to work out satisfactory contracts. . . .

B. Discussion and Conclusions

I

The amended complaint, as further amended at the hearing, alleges Respondent violated Section 8(b)(4)(i)(ii)(B) of the Act by picketing Chipman Freight at Chipman Freight's Oakland terminals and at the entrance reserved for Chipman Freight at Sea-Land's Oakland facility, with an object of forcing or requiring Chipman Freight to recognize and bargain with Respondent on a collective basis for the independent contractor sub-haulers with whom Chipman Freight was doing business. I shall recommend the dismissal of this allegation for the reason that the record does not establish that an object of Respondent's picketing was to force or require Chipman Freight to recognize or bargain with Respondent as the representative of Chipman Freight's sub-haulers.

On 7 August, when the sub-haulers voted to picket Chipman Freight, Ybarrolaza, the director of Respondent's owner/operator division, explained if they voted to picket that Respondent would support their picketing until Chipman Freight took all of them

back to work under the terms and conditions of the recently cancelled sub-haul agreements and, also promised, that the picketing would continue until Chipman Freight put all of them back to work.[6] Subsequently, on 15 August, Ybarrolaza wrote Chipman Freight advising it that Respondent's picketing was not for the purpose of gaining recognition, but the picketing's sole purpose was to return all of the Chipman Freight's sub-haulers to their jobs. In this 15 August letter Ybarrolaza also advised Chipman Freight that Respondent would end its picketing if Chipman Freight took back all of the sub-haulers under the terms and conditions of the recently cancelled sub-haul agreements.[7] The legend on the picket signs was consistent with Ybarrolaza's stated purpose. In view of the foregoing circumstances, I am persuaded the General Counsel has failed to prove that an object of the Respondent's picketing was to force or require Chipman Freight to recognize or bargain with Respondent as the representative of Chipman Freight's sub-haulers. I therefore shall recommend the dismissal of this allegation.

In reaching this conclusion I have considered that on 6 August, the day before the start of the picketing, Ybarrolaza asked Chipman Freight to acknowledge that the sub-haulers were Chipman Freight's employees and to recognize and bargain with Respondent as the sub-haulers' collective-bargaining representative. I also have considered that at his 7 August meeting with the sub-haulers, Ybarrolaza recommended a course of action which included a letter to Chipman Freight stating, among other things, that Respondent represented the sub-haulers. The sub-haulers,

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[6] As described *supra*, Yabarrolaza, before the sub-haulers voted to picket, suggested a different way for them to solve their problem. His recommendation involved, among other things, Chipman Freight's recognition of Respondent as the sub-haulers' representative. The sub-haulers, however, rejected Yabarrolaza's recommendation and voted to picket instead.

[7] "In considering a union's motivation for striking or picketing, [the Board and] courts have found it useful to ask what concessions the company would have to make to abate the union activity [cases cited]" *NLRB v. Union de Empleados* (*National Packing Co.*), 79 LRRM 2705, 2707 (C.A. 1, 1972).

however, rejected this recommendation and, as described *supra*, it is clear from what occurred later during the 7 August meeting when the vote to picket was taken, that the decision to picket and Respondent's decision to sponsor the picketing was unrelated to Respondent's efforts to represent the sub-haulers for collective-bargaining purposes.[8] I also note that Ybarrolaza's 15 August letter to Chipman Freight explained that Respondent's 6 August demand for recognition and bargaining had been made in the context of Respondent's campaign to organize all of the sub-haulers doing business in the Port of Oakland and had been made at the same time as similar demands to a number of other companies whose employees and sub-haulers had expressed a desire to be represented by Respondent. Also, Ybarrolaza's letter further explained that Chipman Freight was the only company picketed, and that the picketing had nothing to do with Respondent's request for recognition, but would end if all of Chipman Freight's sub-haulers were allowed to return to work under the terms and conditions of the recently cancelled sub-haul agreements.

II

The amended complaint, as further amended at the hearing, alleges in substance that Respondent violated Section 8(b)(4)(i)(ii)(B) of the Act by picketing Chipman Freight at Chipman Freight's Oakland terminals and at the entrance reserved for Chipman Freight at Sea-Land's Oakland facility, with an object of forcing or requiring the independent contractor sub-haulers to cease doing business with Chipman Freight. I am persuaded for the reasons set forth hereinafter that this allegation is meritorious.

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[8] The record fails to establish that when Respondent asked Chipman Freight to return all of these sub-haulers back to work under the terms and conditions of the recently cancelled sub-haul agreements, that Respondent was seeking to represent the sub-haulers in the negotiations with Chipman Freight for the terms and conditions of the new sub-haul agreements. As a matter of fact, Ybarrolaza's 16 August letter to Chipman Freight expressly states that "Teamsters Local 70 [Respondent] would not participate in these discussions".

Although Section 8(b)(4)(B) prohibits classic "secondary boycotts"—where a union brings economic pressure against a neutral employer to obtain economic leverage against another employer who is engaged with his employees in a primary dispute—that phase is not used in the statute, and the statute is not limited to addressing that wrong. See, *NMU v. NLRB*, 346 F.2d 411, 416-417, nn. 8, 11, 12 (C.A.D.C., 1965). Congress did not by the passage of Section 8(b)(4)(B) seek to ban only some forms of secondary conduct; rather, Congress recognized that "illegal boycotts take many forms" and "purposefully drafted [Section 8(b)(4)(B)] in [the] broadest terms". *ILA v. Allied Int'l., Inc.*, 456 U.S. 212, 225 (1982). Thus, the statute comprehends not only "the familiar patterns of a secondary boycott" but "variations from those patterns". *NMU v. NLRB*, 346 F.2d at 417 n. 8, quoted in *Soft Drink Workers Union Local 812 v. NLRB*, 657 F.2d 1252, 1259 (C.A.D.C., 1980). Accordingly, "[w]here . . . act and object fall comfortably within the letter of the statute, the Board's hand is to be stayed only upon a pervasive showing that they are beyond its spirit". *Soft Drink Workers Union Local 812 v. NLRB*, 657 F.2d at 1259. See also *ILA v. Allied Int'l., Inc.*, 456 U.S. 212, 225 (1982).

In the instant case, as described in detail *supra*, Respondent picketed Chipman Freight in order to persuade the independent contractor sub-haulers to cease doing business with Chipman Freight, with the ultimate object of forcing Chipman Freight to do business with the sub-haulers under the terms and conditions of the sub-haul agreements recently cancelled by Chipman Freight, rather than under the terms and conditions of the new sub-haul agreements being proposed by Chipman Freight. This picketing satisfies the standards of prohibited "act" and prohibited "object" of Section 8(b)(4)(B). For, it is settled law that picketing constitutes "induce[ment] or encourage[ment]" within the meaning of Section 8(b)(4)(i)[9] and also "coerc[ion] or

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[9] Respondent's picketing took place at Chipman Freight's Oakland terminals where Chipman Freight's employees, represented by another union, were employed. Also employees of the sub-haulers and of Chipman Freight's customers picked up and delivered at these terminals.

restrain[t]" within the meaning of Section 8(b)(4)(ii) (See for example, *IBEW, Local No. 501 v. NLRB*, 341 U.S. 694, 701-704 (1951); *NLRB v. Local No. 85, IBT*, 454 F.2d 875, 878 (C.A. 9, 1972)) and that a disruption of the neutral party's business satisfies the "cease doing business" requirement of Section 8(b)(4)(B). See for example, *ILA v. Allied Int'l., Inc.*, 456 U.S. 212, 222-226, n. 21 (1982). Respondent contends, however, that its picketing was primary and thus not encompassed by Section 8(b)(4)(B). As discussed below, this contention is without merit.

The Board indicated in *Local 814, IBT (Santini Bros., Inc.)* 208 NLRB 184 (1974), aff'd in relevant part, 512 F.2d 564, 566-567 (C.A.D.C., 1975) and *Associated Musicians of Greater Newark, Local No. 16 (Bow and Arrow Manor, Inc.)* 206 NLRB 581, 581- 582 (1973), enf'd 512 F.2d 991 (C.A.D.C., 1975), and expressly held in *Production Workers Union of Chicago and Vicinity, Local 707 et al. (Checker Taxi Company, Inc.)*, 273 NLRB No. 148 (14 December 1984), that a union is not engaged in primary activity—and therefore violates Section 8(b)(4)(B)—when it brings economic pressure against a company to cause a cessation of business between the company and independent contractors with whom it does business, where the union has no dispute concerning the company's own employees. In such circumstances, be the independent contractors employers themselves (see, *Associated Musicians, supra*) or, self-employed persons (see, *Local 814, IBT, supra* and *Production Workers Union, supra*), the picketing union satisfies the "act and object" language of Section 8(b)(4)(B) and is not involved in a primary labor dispute with the picketed company.[10] Moreover, this result is unaffected by the legitimacy of the union's ultimate goal.

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[10] I recognize that Chipman Freight is not a "wholly unconcerned" or "neutral" party in the dictionary sense but, in fact, is involved in the dispute herein. However such terms as "neutral" and "wholly unconcerned" are terms of art in Section 8(b)(4) adjudication and must be understood in light of the statutory objectives. As the Court explained in *Carpet, Linoleum, Soft Tile and Resilient Floor Covering Layers, Local Union No. 419 v. NLRB*, 467 F.2d 392, 400-401 (C.A.D.C., 1972) (emphasis original)

Production Workers Union of Chicago and Vicinity, Local 707 (Checker Taxi Company), 273 NLRB No. 148 slip op. at page 10 (14 December 1984). See also, *American Guild of Musical Artists (Washington School of Ballet)*, 157 NLRB 735, 741-742 (1966); *Federacion De Musicos De Puerto Rico, Local No. 468 (Pat Mills)*, 246 NLRB 782, 785-787 (1979). Because Respondent engaged in just such secondary conduct here—picketing Chipman Freight to cause a cessation of business with their independent contractor sub-haulers,[11] in the absence of a dispute

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> [T]he mere fact that the relationship between two parties involves some economic interdependence is not sufficient in and of itself to cause one of the parties to lose its "secondary" status, for Section 8(b)(4)(B) purposes, *vis-a-vis* the other party. This conclusion is dictated by the very nature of secondary boycotts. It is intuitively obvious that a union which is engaged in a labor dispute with one party will not endeavor to enlist the support of another party, *unless* there is some relationship present, direct or indirect, between the two parties. This most frequently involves an economic relationship. Without the presence of *some* interrelationship between the two parties, it would be an exercise in futility for the Union to seek the aid of the second party, since it would necessarily have no possible means of providing meaningful support for the union. It is therefore logically apparent that something more than mere economic interdependence between two parties is required before one loses its "secondary" status with respect to the labor disputes of the other.
>
> Chipman Freight's status as a neutral does not derive from a complete lack of involvement in the dispute, but from its non-involvement in a primary labor dispute. Similarly, the fact that Chipman Freight possesses the power to end the picketing by agreeing to the Respondent's demands does not render the dispute "primary"; for, as indicated in *Carpet Layers, supra*, it is not unusual for a secondary employer to possess the power to resolve—or substantially aid the resolution of—a labor dispute. Yet that power has never been deemed sufficient to convert the secondary employer into a primary. See *Local 399, IBEW (Illinois Bell)*, 235 NLRB 555, 555-556, 559-562, enf'd 601 F.2d 593 (C.A. 7, 1979).

[11] It is clear that a natural consequence of Respondent's picketing was the cessation of business between Chipman Freight and the independent

concerning Chipman Freight's employees—the General Counsel has established, as alleged in the complaint, Respondent violated Section 8(b)(4)(i)(ii)(B) of the Act. *Production Workers Union of Chicago and Vicinity, Local 707 et al. (Checker Taxi Company)*, 273 NLRB No. 148 (14 December 1984).[12]

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contractor sub-haulers. Respondent had every reason to foresee that the sub-haulers, in deference to the picket line, would not resume doing business with Chipman Freight until the ultimate object of the picketing was accomplished. Under the circumstances a prohibited cease doing business object was necessarily subsumed with Respondent's ultimate object for picketing, and Respondent necessarily had this subsidiary object regardless of its ultimate object. Also, with respect to the picketing's ultimate object—requiring Chipman Freight to do business with the independent contractor sub-haulers under the terms and conditions of the sub-haul agreements recently cancelled by Chipman Freight, rather than under the terms and conditions of the new agreements being proposed by Chipman Freight—it required Chipman Freight to change its method of doing business with the independent contractor sub-haulers in significant respects, thus satisfying the "cease doing business" requirement of Section 8(b)(4)(B). See, *NLRB v. Local 85, Operating Engineers*, 400 U.S. 297 (1971). Chipman Freight was faced with the option of suffering a severe disruption of its business, including a loss of customers, or doing business with the independent contractor sub-haulers under the terms and conditions dictated by the Respondent's picket line, rather than under the terms and conditions of the new sub-haul agreements being proposed by Chipman Freight.

[12] I agree with the General Counsel and Chipman Freight that the facts in the instant case fall squarely within the rule set forth in *Checker Taxi*. There, two taxi cab companies employed drivers who leased cabs from the companies. The drivers were independent contractors. The respondent unions demanded that the companies recognize the unions as the leased cab drivers' bargaining representative and negotiate an agreement establishing uniform conditions regarding the leasing of cabs. The companies rejected this demand and the unions picketed the companies' garages used by the leased cab drivers, with picket signs stating that the leased cab drivers were on strike and asking that they not lease cabs until an agreement was reached regarding their working conditions. It was undisputed that the unions picketed in order to persuade the independent contractor leased cab drivers to cease doing business with the companies, with the ultimate goal of forcing the companies to recognize and bargain with the unions. The Board found

Conclusions of Law

1. Respondent, Brotherhood of Teamsters and Auto Truck Drivers, Local 70 of Alameda County, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America is a labor organization within the meaning of Section 2(5) of the Act.

2. By picketing Chipman Freight Services with an object of interrupting the business relationships between Chipman Freight Services and the independent contractor sub-haulers, the Respondent has violated Section 8(b)(4)(i)(ii)(B) of the Act.

3. These unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that the Respondent has engaged in certain unfair labor practices, it shall be recommended that the Respondent be ordered to cease and desist therefrom and that it take

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that, "[b]y picketing the Charging Parties with an object of interrupting the leases between the Charging Parties and the leased cab drivers . . . the Respondents have violated Section 8(b)(4)(i)(ii)(B) of the Act." In the instant case, as I have found *supra*, Respondent picketed Chipman Freight with picket signs informing the independent contractor sub-haulers that Chipman Freight was unfair to them. Respondent picketed in order to persuade the sub-haulers to cease doing business with Chipman Freight, with the ultimate object of forcing Chipman Freight to do business with the sub-haulers under the terms and conditions of the sub-haul agreements previously cancelled by Chipman Freight, rather than under the terms and conditions of the new agreements being proposed to the sub-haulers by Chipman Freight. Plainly, one of the objects of Respondent's picketing—requiring Chipman Freight to do business with the independent contractor sub-haulers only under the terms and conditions of the cancelled sub-haul agreements rather than under the new agreements being proposed by Chipman Freight—was similar in significant respects to "an object of interrupting the leases between the Charging Parties and the leased cab drivers" found by the Board in *Checker Taxi* to have constituted a prohibited cease doing business object.

certain affirmative action designed to effectuate the policies of the Act.

I have granted General Counsel's request for a broad remedial order because in *Teamsters Local 70, IBT (United States of America, Department of the Navy)*, 261 NLRB 496 (1982), the Board found that Respondent violated Section 8(b)(4)(i)(ii)(B) of the Act and remedied the violation with a broad remedial order inasmuch as Respondent's proclivity to violate Section 8(b)(4)(B) had been established. *Id* at pages 502-503. Respondent urges that a broad remedial order is not appropriate because Respondent had legitimate grounds for believing that its picketing was not prohibited by Section 8(b)(4)(B) of the Act and because of the lapses of time between its picketing and the Board's order in *Department of the Navy*. I disagree. As I have indicated, *supra*, any doubt that a union is not engaged in primary activity—and therefore violates Section 8(b)(4)(B)—when it brings economic pressure against a company to cause a cessation of business between the company and independent contractors with whom it does business, where the union has no dispute concerning the company's employees, was removed by the Board's decision in *Checker Taxi* which was issued approximately 6 months prior to the Respondent's picketing. And, with respect to the lapse of time between the Respondent's picketing herein and the broad remedial order issued against Respondent in *Department of the Navy*, the order which issued 29 April 1982 was not based merely upon the 1981 picketing involved in that case, but upon other picketing of Respondent which violated Section 8(b)(4)(B) engaged in during the 1960's, the 1970's and the 1980's.[13] In view of these circumstances I am not persuaded that the approximately 3 years which elapsed, since the Board's order in *Department of the Navy* and Respondent's illegal picketing herein, constitute a sufficient lapse of time so as to make a broad remedial order inappropriate.

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[13] The broad remedial order issued in *Department of the Navy* was based upon Respondent's proclivity to violate Section 8(b)(4)(B) of the Act as was evidenced by Board orders issued in 1969, 1971, 1978 and 1981 as well as by Respondent's illegal conduct found in that case. *Teamsters Local 70, IBT*, 261 NLRB at pages 502-503.

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record in this proceeding, and pursuant to the provisions of Section 10(c) of the Act, I hereby issue the following recommended:[14]

ORDER

Respondent, Brotherhood of Teamsters and Auto Truck Drivers, Local 70 of Alameda County, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Oakland, California, its officers, agents, successors and representatives, shall:

1. Cease and desist from:

(a) Inducing or encouraging any individual employed by Chipman Freight Services or by any other person engaged in commerce or in an industry affecting commerce to engage in a work stoppage or strike or refusal in the course of his employment to transport, use or handle any materials or to perform any service; or threatening, coercing, or restraining Chipman Freight Services or any other person engaged in commerce or in an industry affecting commerce, where in any case an object thereof is to force or require, directly or indirectly, Chipman Freight Services or any person to cease doing business with any other person, under circumstances prohibited by Section 8(b)(4)(B) of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Post at its business office and meeting halls copies of the attached notice marked "Appendix."[15] Copies of this notice, on

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[14] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[15] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by order of the

forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representatives, shall be posted by the Respondent immediately upon receipt and maintained by Respondent for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Sign and mail to the Regional Director for Region 32 sufficient copies of said notice, to be furnished by him for posting by Chipman Freight Services, if willing.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated: 27 December 1985

/s/ JERROLD H. SHAPIRO
Jerrold H. Shapiro
Administrative Law Judge

National Labor Relations Board" shall read "Posted pursuant to a judgment of the United States Court of Appeals enforcing an order of the National Labor Relations Board."

Appendix

Notice to Members

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT induce or encourage any individual employed by Chipman Freight Services or by any other person engaged in commerce or in an industry affecting commerce to engage in a work stoppage or strike or refusal in the course of his employment to transport, use or handle any materials or to perform any service; or threaten, coerce, or restrain Chipman Freight Services or any other person engaged in commerce or in an industry affecting commerce, where in any case an object thereof is to force or require, directly or indirectly, Chipman Freight Services or any person to cease doing business with any other person, under circumstances prohibited by Section 8(b)(4)(B) of the Act.

Brotherhood of Teamsters and Auto Truck Drivers, Local 70 of Alameda County, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America

(Labor Organization)

Dated _____ By _____
(Representative) (Title)

This is an Official Notice and Must not be Defaced by Anyone

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 2201 Broadway, 2nd Floor, P.O. Box 12983, Oakland, CA 94604. Telephone Number: (415) 273-6122.

Appendix C

Sec. 8. (b) It shall be an unfair labor practice for a labor organization or its agents—

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8(e);

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

Appendix D

Production Workers Union of Chicago and Vicinity, Local 707; The National Production Workers Union and Checker Taxi Company, Inc. and Yellow Cab Company, Inc. Cases 13-CC-1159 and 13-CC-1160

14 December 1984

DECISION AND ORDER

By Chairman Dotson and Members Zimmerman and Hunter

On 9 March 1981 Administrative Law Judge Stanley N. Ohlbaum issued the attached decision. The General Counsel and the Charging Parties[1] filed exceptions and supporting briefs, and the Respondents filed an answering brief and motion to strike the Charging Parties' briefs.[2]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and recommendations only to the extent consistent with this Decision and Order.

The pertinent facts are not in dispute. The two Charging Parties, Checker Taxi Company (Checker) and Yellow Cab Company (Yellow), own between them 3666 of the 4600 taxicabs franchised in Chicago. As franchise holders they may lease out their cabs but the lessees ("leased cab drivers" or "LCDs") may not, under a city of Chicago ordinance, sublease the cabs or permit them to be driven by other drivers.

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[1] The Charging Parties have requested oral argument. This request is denied as the record, the exceptions, and the briefs adequately present the issue and the positions of the parties.

[2] The Respondents have moved to strike the briefs of the Charging Parties as failing to comply with Board Rules and Regulations. This motion of the Respondents is denied as lacking in merit.

Six of Yellow's seven garages house only LCD cabs. The remaining garage houses cabs operated by "commission drivers," who are drivers employed by Yellow. Similarly, Checker maintains five garages all with cabs operated exclusively by LCDs with the exception of one garage with cabs operated both by LCDs and commissioned drivers. At the time of the hearing, only 340 of Yellow's 2166 cabs and 200 of Checker's 1500 cabs were operated by commissioned drivers. LCDs lease their cabs for periods ranging from half of a day to 1 week. Generally, they lease the cabs on a daily basis.

No clerical personnel at the Yellow and Checker garages are unionized but the service and maintenance employees and commissioned drivers are represented by the Seafarers Union Local 777.[3] The LCDs are alleged and admitted to be independent contractors.[4]

Sometime in 1980, the LCDs became increasingly dissatisfied with the terms of their leases and began to band together to deal collectively with the Charging Parties under the leadership of an LCD, the Reverend Joseph McAfee. In early July 1980, McAfee consulted with officials of Respondent Unions. By the end of July, McAfee had enlisted about 1200 of the approximately 3126 Yellow and Checker LCDs in his collective effort and had formed the so-called "Leased Taxicab Drivers Division" within Respondent Unions. For a time the division had a separate office. Initiation fees and dues collected from the LCDs were used for office rent and maintenance, and for organizational expenditures.

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[3] The parties stipulated that the Respondents do not seek to represent any employees represented by the Seafarers.

[4] The United States Court of Appeals for the District of Columbia found these LCDs to be independent contractors in *Seafarers Local 777 v. NLRB*, 603 F.2d 862 (D.C. Cir. 1979). The General Counsel has stated correctly that for purposes of the instant case, the court's decision is the law of the case and therefore controlling on the independent contractor status of the LCDs. The parties stipulated that the nature of the Charging Parties' operations has not changed since the court of appeals' decision.

By letters dated 8 August 1980 Respondent Unions requested on behalf of "the overwhelming majority of the drivers who are leasing cabs from your company" that the Charging Parties, respectively, meet with the Unions "for the purpose of reaching an agreement setting forth uniform conditions regarding the leasing of the cabs." The Charging Parties refused to recognize, meet, or bargain with the Unions and have continued to refuse to meet with the Unions up to the time of the hearing.

On 12 August 1980 the Respondent Unions and the LCDs started picketing and handbilling several of the garages of the Charging Parties.[5] The picket signs read variously: "Please do not lease a cab until an agreement is signed regarding your working conditions"; "On Strike Production Workers Union Local 707";[6] "Lease Cabs on Strike Production Workers Union Local 707"; and "Lease Cab 707 Drivers 707 on Strike Yellow & Checker Taxi Cab Company." The picketing activity was effective in reducing the number of cabs leased by the LCDs from the Charging Parties.

At the inception of the picketing, a picket line went up at the one Yellow garage housing vehicles operated only by its commissioned drivers. As soon as a Seafarers official arrived and complained, the pickets left. The picketing at that garage lasted at most for 30 minutes. Other than this one incident, the picketing was confined to garages out of which LCDs operated and was solely directed at the Charging Parties and their potential LCDs. Apparently, however, during the picketing some of the Charging Parties' suppliers refused to make deliveries. There is no evidence that members of the public who use taxicabs patronize the garages directly or that any individuals declined to use taxicabs during the picketing.

There is evidence that considerable violence, not shown to have been directly linked to the Respondents or the picketing, occurred

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[5] The Respondents' counsel stated on the record, "We started picketing . . ." and "We agree we picketed."

[6] This sign was not authorized by the Respondents and its use was discontinued within a day or less after it was first displayed.

during the Respondents' efforts to obtain recognition as representative of the LCDs. On 9 September 1980 the Board's Regional Director in Chicago sought a temporary injunction under Section 10(1) of the Act in the United States District Court for the Northern District of Illinois, Eastern Division, pending disposition of this proceeding. The Regional Director's petition was denied by the court on 11 December 1980. The Charging Parties also unsuccessfully sought an injunction in the Circuit Court of Cook County against the Respondents and all the LCDs involved in the collective activity. The Illinois Court of Appeals affirmed the Circuit Court's ruling that there was, inter alia, no illegal purpose to the picketing and no nexus shown between the alleged violence and the Respondents.

Relying in part on the absence of any conventional "labor dispute," the administrative law judge concluded, inter alia, that subject matter jurisdiction could not properly be asserted here and, accordingly, that the Respondents have not violated Section 8(b)(4)(i) and (ii)(B) of the Act. We cannot agree with the judge that the Board lacks subject matter jurisdiction here or that the Respondents did not violate Section 8(b)(4) of the Act.

With regard to the lack of a conventional labor dispute as defined in Section 2(9) of the Act, there is some conflict in the circuit courts regarding the import of that fact on Board jurisdiction. As noted by the judge, the Fourth Circuit has found that a conventional labor dispute is a prerequisite to Board jurisdiction.[7] In contrast, the Circuit Court for the District of Columbia held in *Maritime Union (Delta Steamship) v. NLRB*,[8] and later in *Monarch Long Beach Corp.*,[9] that Section 2(9) of the Act does not define the Board's jurisdiction and, since the term "labor dispute" does not appear in Section 8(b)(4), that section's operation is not limited by the definition of "labor dispute" in Section 2(9). This dispute appears to have been laid to rest by the Supreme Court recently in *Longshoremen ILA v. Allied Interna-*

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[7] *NLRB v. Longshoremen's ILA*, 332 F.2d 992 (4th Cir. 1964).

[8] 346 F.2d 411 (D.C. Cir. 1965).

[9] *Teamsters Local 812 v. NLRB*, 657 F.2d 1252 (D.C. Cir. 1980).

tional[10] in which the union argued that the boycott in question was not a "labor dispute" but rather a political dispute with a foreign nation. The Supreme Court rejected the union's argument stating that neither the plain language of Section 8(b)(4) nor the legislative history confined the scope of that section to "labor" as opposed to "political" disputes. The Court added that Section 8(b)(4) was deliberately "drafted broadly" and that "[d]espite criticism from President Truman as well as from some legislators that the secondary boycott provision was too sweeping, the Congress refused to narrow its scope. Recognizing that '[i]llegal boycotts take many forms' . . . Congress intended its prohibition to reach broadly."[11] In this light, we find that, contrary to the judge, the Board does have subject matter jurisdiction in this case.

The judge further concluded that the activities of the Unions here were not those of a "labor organization qua labor organization and as such they should not be treated as labor organizations for purposes of Section 8(b)(4)." This hypothesis is not supported by case precedent. In their answer, the Respondents admit that they are labor organizations within the meaning of the Act, thus avowing that they exist at least in part for the purposes set forth in Section 2(5) of the Act. And, as such, it has long been established that the Respondents are subject to the proscriptions of Section 8(b)(4) whether or not their activities concern statutory employees.[12] Accordingly, the fact that the Respondent Unions' ulitimate objective was improved leases for a group of independent contractors rather than more customary union objectives cannot shield the Unions if their conduct is otherwise unlawful in nature.

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[10] 456 U.S. 212 (1982).

[11] Id. at 225.

[12] See, e.g., *Masters, Mates & Pilots Local 47 (Chicago Calumet Stevedoring)*, 144 NLRB 1172 (1963); *Electrical Workers IBEW (McCormick & Sons)*, 150 NLRB 363 (1964), enfd. 350 F.2d 791 (D.C. Cir. 1965); and *Machinists (Lufthansa German Airlines)*, 197 NLRB 232 (1972).

The question remains then whether the Respondents' conduct, when subjected to the scrutiny of Section 8(b)(4), was violative of that section of the Act. Concededly, the usual example cited in the legislative history of conduct addressed by Section 8(b)(4) involves a labor dispute in which the union's activity is directed toward a neutral employer in order to pressure another employer whose employees the union seeks to represent or benefit. This is clearly not the factual situation presented to us here. However, "the mere fact that the language of this Section comprehends the familiar patterns of a secondary boycott in the customary sense does not inexorably dictate the conclusion that it excludes all variations from those patterns."[13] Moreover, although the term "secondary boycott" is generally used as a "short-hand reference to the conduct forbidden by Section 8(b)(4),[14] as noted earlier the actual language of Section 8(b)(4) is intentionally broad and our application of that section need not be limited by that term when, as here, a union's conduct fits within the actual language of the statute.[15]

For interpretation of such a broadly drafted legislative provision the Supreme Court suggests, in *National Woodwork Mfrs.*, examining the problem to which the legislation was addressed.[16] In this regard, the general congressional declaration of purpose and policy stated in the Act itself is "to promote the full flow of commerce" and "to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare." Thus, as the Supreme Court stated in *Allen Bradley & Co. v. Local 3*,[17] Congress was concerned with preserving a "competitive business economy" and balancing this

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[13] *Delta Steamship*, supra at 417.

[14] Ibid.

[15] Significantly the words "secondary boycott" do not appear in Sec. 8(b)(4) or elsewhere in the statute.

[16] 386 U.S. 612, 620 fn. 5 (1967).

[17] 325 U.S. 797, 806 (1945), quoted in *NLRB v. International Rice Milling Co.*, 341 U.S. 665 fn. 7 (1951). See also *Maritime Union v. NLRB*, 342 F.2d 538, 544 (2d Cir. 1965).

goal with preserving "the rights of labor to organize to better its conditions through the agency of collective bargaining." And, specifically regarding Section 8(b)(4), the Supreme Court has found "the dual Congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own."[18] Although it is fairly clear here that the aim of the Unions is to circumvent the circuit court decision finding the LCDs to be independent contractors rather than employees, the fact remains that these LCDs have been found to be independent contractors and, as such, the Union's efforts on their behalf[19] fall neither within "the right of labor to organize to better its conditions" (*Allen Bradley*, supra) or "the rights of labor organizations to bring pressure to bear on offending employers in primary labor disputes" (*Denver Building Trades*, supra). Moreover, the respondents' activities clearly had a deleterious effect on commerce. As a matter of balancing general policy objectives, then, the equations are not balanced in the Respondents' favor.

Additionally, note should be made of the intent behind the 1959 amendments to Section 8(b)(4). It is clear from the legislative history that the Congress was concerned, in part, with instances during which unions had used coercive tactics where their objectives were unrelated to representing employees. Thus, the Senate report on the bill states that it was designed to include "boycotts by railroad employees, agriculture workers, Government employees and *other groups* now excluded from the secondary boycott ban of the Taft-Hartley Act—secondary boycotts by these groups are just as much against the public interest as boycotts by anyone else."[20] Thus the courts have found that Section 8(b)(4) encompasses conduct on behalf of individuals

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[18] *NLRB v. Denver Building Trades Council*, 341 U.S. 675, 692 (1951).

[19] Contrary to the judge's finding that the Respondents acted only in an advisory capacity, as noted above the Respondents admit in their answer and on the record that they picketed the Charging Parties.

[20] 1959 U.S. Code Cong. & Ad. News 2394 (emphasis added).

found not to be statutory employees.[21] And, consistent with this legislative history, the Supreme Court agreed with the court of appeals in *Allied International*, supra, involving a refusal by longshoremen to unload vessels with cargo shipped from the Soviet Union, that it is "more rather than less objectionable that a national labor union has chosen to marshal against neutral parties the considerable powers derived by its local and itself under the federal labor laws in aid of a random political objective far removed from what has traditionally been thought to be the realm of legitimate union activity."[22]

Given the strong legislative and case history, some equally strong indication that picketing on behalf of independent contractors, i.e., forcing or requiring any "person" to cease using the products of any other producer, was intended to be protected by the proviso shielding primary activity would seem to be required. However, we find no implication in either the legislative history or case precedent that Congress intended the "primary" proviso to apply to this conduct. Indeed, what precedent there is weighs heavily against such an extension of the definition of "primary." Thus, in *Santini Bros.*, the union was attempting to become the collective bargaining representative of a group of truckdrivers. Since the Board found those drivers to be independent contractors, it also found the union's conduct violative of Section 8(b)(4).[23]

We note in a related vein that it is not necessary, in order to find unlawful "secondary" activity, to find that a "primary" dispute exists at all.[24] For example, in *Monarch Long Beach*,

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[21] See, e.g., *Chicago Calumet Stevedoring*, supra, and *Marriot In-Flite Service v. Transport Workers*, 557 F.2d 295 (2d Cir. 1977).

[22] *Allied International*, supra at 1664.

[23] 208 NLRB 184 (1974). See also *Teamsters Local 221 (Perkins Motor Transport)*, 222 NLRB 423 (1976).

[24] *Delta Steamship*, 346 F.2d 411 at fn. 14. See also *Bow & Arrow Manor*, 206 NLRB 581 (1973). Thus, while we find that the *restrictive* scope of Sec. 8(b)(4) is not limited to "labor disputes," this finding is thoroughly consistent with our conclusion that the "primary proviso"

supra, the union urged consumers to boycott those soft drinks sold by Monarch, a retail store, which were not locally bottled. Since the location of bottling was not clearly marked on the soft drink containers, the union in effect was urging a general boycott of soft drinks sold by Monarch. The court found "ample authority to support the Board's view that it need not identify a 'primary labor dispute' to find a violation of Section 8(b)(4)(ii)(B)."[25]

In conclusion, the Union's picketing here, directed at the LCDs with the objective of circumventing the circuit courts' decision finding that the LCDs are independent contractors, was violative of Section 8(b)(4)(ii)(B) of the Act. And, it is not material whether or not the Unions' ultimate goal was lawful, since its intermediate goal, that of causing the interruption of leases between the Charging Parties and the LCDs, in the absence of a primary labor dispute, was clearly within the scope of the broad proscription of Section 8(b)(4)(ii)(B).

With regard to the alleged violation of Section 8 (b)(4)(ii)(B)—the picketing of the Yellow Cab garage housing only vehicles operated by commissioned drivers—there is no evidence that the Respondents could not have learned that no LCDs used the garage before they commenced picketing. Concededly, the Respondents ceased picketing at that garage as soon as they were apprised by a representative of the Seafarers that no LCDs were present. However, "[t]he Act does not say you may picket whenever you wish, and against any employer you may wish, and continue picketing while you inquire and determine—in your own judgment—whether you have a right to do such picket-

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was not intended to exempt picketing by labor organizations on behalf of independent contractors. Indeed, that is precisely our point—it is unnecessary to even decide here where the "primary" disputes lie, or whether there is any primary dispute at all, since it is clear that the Union here is *not* engaged in a primary labor dispute with the employers.

[25] *Monarch Long Beach*, 657 F.2d at 1259. See also *Delta Steamship*, supra.

ing."[26] Accordingly, we find the Respondents' conduct to be violative of Section 8(b)(4)(ii)(B) of the Act.

Conclusions of Law

1. Respondents Production Workers Union of Chicago and Vicinity, Local 707 and The National Production Workers Union are labor organizations within the meaning of Section 2(5) of the Act.

2. By picketing the Charging Parties with an object of interrupting the leases between the Charging Parties and the leased cab drivers and inducing the commissioned drivers to cease work, the Respondents have violated Section 8(b)(4)(i) and (ii)(B) of the Act.

3. These unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that the Respondents have engaged in certain unfair labor practices, it shall be recommended that the Respondents be ordered to cease and desist therefrom and that they take certain affirmative action designed to effectuate the policies of the Act.

ORDER

The Respondents, Production Workers Union of Chicago and Vicinity, Local 707; The National Production Workers Union, Chicago, Illinois, their officers, agents, and representatives, shall

1. Cease and desist from

(a) Threatening, coercing, or restraining Checker Taxi Company, Inc. and Yellow Cab Company, Inc. or any other persons engaged in commerce or an industry affecting commerce, where an object thereof is to force the above-named persons or any other

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[26] *Broadcast Employees (Osprey Productions)*, 226 NLRB 641, 644 (1976).

person to cease doing business with leased cab drivers under circumstances prohibited by Section 8(b)(4)(ii)(B) of the Act.

(b) Engaging in or inducing or encouraging employees of the Yellow Cab Company, Inc. or other employees engaged in commerce or in an industry affecting commerce to engage in a work stoppage or strike or refusal in the course of their employment to use or handle any materials or to perform any service as prohibited by Section 8(b)(4)(i)(B) of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at their business office and meeting halls copies of the attached notice marked "Appendix."[27] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondents' authorized representative, shall be posted by the Respondents immediately upon receipt and maintained by them for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Sign and mail to the Regional Director for Region 13 sufficient copies of said notice, to be furnished by him for posting by Checker Taxi Company, Inc. and Yellow Cab Company, Inc. if willing.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondents have taken to comply.

It is further ordered that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

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[27] If this order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Appendix

Notice To Employees
Posted by Order of the National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

We will not threaten, coerce, or restrain Checker Taxi Company, Inc., or Yellow Cab Company, Inc. or any other person engaged in commerce or in an industry affecting commerce, where the object thereof is to force the above-named persons or any other person to cease doing business with leased cab drivers under circumstances prohibited by Section 8(b)(4)(ii)(B) of the Act.

We will not induce or encourage employees of the Yellow Cab Company, Inc. or any other employer engaged in commerce to engage in a work stoppage or strike or refusal in the course of their employment to use or handle any materials or perform any service as prohibited by Section 8(b)(4)(i)(B) of the Act.

Production Workers Union of Chicago and Vicinity, Local 707;
The National Production Workers Union

DECISION

Preliminary Statement

Stanley N. Ohlbaum, Administrative Law Judge. This consolidated proceeding[1] under the National Labor Relations Act was litigated before me in Chicago, Illinois, on October 22-24, 1980, with all parties participating throughout by counsel, who were afforded full opportunity to present evidence and contentions and thereafter to file briefs received by November 26, 1980. Addi-

[1] Based on a consolidated complaint issued on September 23 by the Board's Acting Regional Director for Region 13, stemming from charges filed by the Charging Parties on September 2 as amended on September 9, 1980.

tional documents were subsequently received. These[2] have been made part of the record which, together with briefs, have been carefully considered.

The basic issue is whether Respondent Unions have violated Section 8(b)(4)(i) and (ii)(B) of the Act in various respects to be described.

On the entire record and my observation of the testimonial demeanor of the witnesses, I make the following

Findings and Conclusions

I. Parties; Jurisdiction

At all material times, Respondents Production Workers Union of Chicago and Vicinity, Local 707 and The National Production Workers Union have been and are labor organizations within the meaning of Section 2(5) of the Act, with their principal office in Chicago, Illinois. At all material times Charging Party Checker Taxi Company, Inc. (Checker Taxi or Checker) has been and is a New York corporation and Charging Party Yellow Cab Company (Yellow Cab or Yellow) has been and is a Maine corporation; each of said Charging Parties has maintained an office and place

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[2] I.e., (1) a December 15, 1980 one-page letter from Respondents' counsel, with attached five-page transcript of proceedings before Honorable Prentice H. Marshall, U.S. district judge for the Northern District of Illinois, Eastern Division, in Case No. 80 C 4819 entitled *Donald J. Crawford, Acting for the National Labor Relations Board, Petitioner v. Production Workers Union of Chicago, Local 707; The National Production Workers, Respondents* (marked herein ALJ Exhs. 1 and 2); (2) a seven-page December 19, 1980 letter from the Charging Parties' counsel, responsive to the foregoing item (1) (ALJ Exh. 3); and (3) a January 21, 1981 one-page letter from Respondents' counsel, with attached seven-page opinion of Justice Jiganti on behalf of the Illinois Appellate Court, First District, on December 31, 1980, in Case No. 80-2516 entitled *Yellow Cab Company, Inc and Checker Taxi Company, Inc., Plaintiffs-Appellants vs. Production Workers Union of Chicago and Vicinity, Local 707, an Affiliate of the National Production Workers Union; National Production Workers Union* [*et al.*], *Defendants-Appellees* (ALJ Exhs. 4 and 5).

of business in and has been engaged in providing public taxicab service in Chicago, Illinois. During the representative year immediately preceding issuance of the consolidated complaint, each of the Charging Parties derived gross revenues exceeding $500,000 in its business operations; and, during the same period, each of the Charging Parties annually purchased and received goods and materials valued in excess of $50,000 at and for use in its business operations in Illinois.

I find that at all material times each of the Charging Parties has been and is a person engaged in commerce within the meaning of the Act.[3]

II. Alleged Unfair Labor Practices

A. Facts as Found

Much basic fact here is not in essential dispute. The record contains expansive colloquy with counsel exploring their basic contentions in what appears to be fundamentally a case of novel impression.

Charging Parties Checker Taxi and Yellow Cab control most of the taxicab industry in Chicago. Of the 4600 taxicabs franchised in Chicago, Yellow Cab owns 2166 and Checker Taxi 1500, for an aggregate of 3666, with only 934 comprising all of the remainder. By Chicago ordinance, cabs may be operated only by the licensees or franchise (medallion) holders, who may, however, lease out their cabs; but such lessees (leased cab drivers or LCDs) may not sublease or permit the cabs to be operated by others. Yellow Cab maintains seven Chicago cab garages, with only one (South Indiana Avenue) housing cabs operated solely by drivers (commission drivers) in its own employ, all six others housing only LCD-operated cabs. Checker Taxi maintains five Chicago cab garages, with cabs in only one (North Elston Avenue) housing cabs operated by "commission drivers" in its own employ as well as cabs operated by LCDs; all of its four other garages house only LCD-operated cabs. All garages of each Company are staffed and

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[3] Conclusions concerning jurisdiction over the subject matter of this proceeding are set forth infra.

maintained by nonunionized managerial and clerical personnel and by unionized maintenance and service employees (car-washers, greasers, mechanics, radio technicians, etc.) represented by Seafarers Union Local 777. There is no indication that the traveling public patronizes any of these garages. Taxicabs are leased out by each of the Companies to LCDs on a daily, half-daily, several days, or weekly basis, the predominant arrangement being the daily lease at a base rental of $41 or $43.

Over the course of the past several years (2 in the case of Yellow Cab, 5 in the case of Checker Taxi), both Yellow Cab and Checker Taxi have converted the essential nature of their operations from running their cabs through their own employees (commission drivers)—with whom they were under obligation to bargain collectively under the Act—to the present system of leasing out their taxicabs to individual independent operators (LCDs), so that as of August 1980 only 340 of Yellow Cab's 2166 cabs were operated by its own commission driver employees and the balance of 1826 by LCDs; and similarly, at the time of this trial, only 200 of Checker Taxi's 1500 cabs were operated by drivers in its own employ and the balance of 1300 by LCDs.[4] The commission driver-operated cabs and the LCD-operated cabs of each of the Companies are not commingled, but segregated from each other by identifying numbers.

At all times herein material, Charging Parties Checker Taxi and Yellow Cab have been involved in "providing" public taxicab service in Chicago through their ownership of taxicabs, franchised by the city of Chicago, operated through the foregoing two different categories of drivers—i.e., (1) a dwindling number of commission drivers in their direct employ as employees within the meaning of the Act and represented for collective bargaining by Seafarers Union and (2) an ever-increasing number of operators to whom they rent or lease their taxicabs (leased cab drivers or LCDs). As to the second category (LCDs), the complaint (par.

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[4] This changeover in Yellow and Checker operations from their own "commission driver" employees to independent contractor LCDs is discussed in the opinions of U.S. Circuit Court of Appeals Judge MacKinnon at 603 F.2d 862 (1978) in the case cited in fn. 5, infra.

II(g)) alleges that they (i.e., the LCDs) have at all material times been and are independent contractors.[5] As has already been indicated, the first category drivers—i.e., the taxicab companies' commission drivers in their employ as employees—have been and are, together with the Companies' "inside" maintenance and automotive service personnel, represented for collective bargaining by Seafarers Local Union 777, and it is stipulated that Respondents do not seek to represent any of them. At least since the conversion of the Charging Parties' operations from direct employment of drivers to the leasing of their cabs, the LCDs—as they no longer have the status of employees within the meaning of the Act—have been unrepresented for collective bargaining as employees.

Because of mounting dissatisfaction with what they regarded as the unsatisfactory and increasingly onerous terms and provisions under which the Charging Parties were leasing out their taxicabs, the LCDs, under leadership of one of their number, Reverend Joseph McAfee, associated themselves to deal collectively with the taxicab companies in order to obtain more favorable lease terms. There accordingly came a time, in early July 1980, when McAfee consulted with officials of Respondent Unions to seek the benefit of their supposed expertise in dealing with the taxicab companies to obtain more favorable lease terms. Before the end of July, McAfee had enlisted about 1200 fellow LCDs in this cooperative endeavor. McAfee did not seek to enlist any "commission driver" employee or inside employee, nor is there any indication or claim that any person in that category at any time joined therein.

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[5] It is also so conceded by all parties and has likewise been so determined by the U.S. Court of Appeals in its October 20, 1978 (as amended July 5 and 27, 1979) decision in *Seafarers Local 777 v. NLRB*, 603 F.2d 862 (G.C. Exh. 2). The General Counsel has indicated on the record here, on behalf of the Board, that the Board acquiesces in that decision and that it is binding and controlling here on the issue of the status of the LCDs as independent contractors as distinguished from employees within the meaning of the Act.

On this basis, in late July or early August 1980, there was organized, formed, or constituted within Respondents an infrastructure known as the Leased Taxicab Drivers Division,[6] for a time with its own separate office location and meeting place. Initiation fees and dues, collected from LCDs who joined, were utilized for office rent and maintenance and for organizational expenditures.

By letters to each of the Charging Parties on August 8, 1980, from Respondents on behalf of the "overwhelming majority of the drivers who are leasing cabs from your company," Respondents requested "that you meet with us for the purpose of reaching an agreement setting forth uniform conditions regarding the leasing of these cabs" (G.C. Exhs. 11 and 12). The Charging Parties failed to accede to this request. It is conceded that the Charging Parties have at all times refused to recognize, meet, or negotiate with Respondents or the LCDs in any way concerning the terms and conditions on which the taxicabs are leased or rented out. Indeed, Checker Taxi acknowledges posting notices to the effect that it would "never" deal with Respondents, while Yellow Cab acknowledges that it has publicized that it would not deal with Respondents since the LCDs are independent contractors with whom it is under no obligation to negotiate under the Act or otherwise. It is stipulated that the nature of the operations of the Charging Parties has in no way changed since or in consequence of the U.S. Court of Appeals 1978 decision cited supra (fn. 5) determining the LCDs to be independent contractors and not employees within the meaning of the Act.

Commencing on August 12, 1980, LCDs picketed and handbilled various Chicago garages of the Charging Parties, admittedly in order to attempt to induce the Charging Parties to negotiate with them for improved lease terms and conditions for the LCDs, as well as to induce potential LCDs to refrain from leasing taxicabs until the taxicab companies so negotiated. The picket signs read: "Please do not lease a cab until an agreement is signed concerning your working conditions" (G.C. Exh. 13); "On Strike

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[6] See, e.g., G.C. Exhs. 20, 21, and 24.

Production Workers Union Local 707" (G.C. Exh. 14);[7] "Lease Cabs on Strike Production Workers Union Local 707" (G.C. Exh. 15); and "Lease Cab 707 Drivers 707 on Strike Yellow & Checker Taxi Cab Company" (G.C. Exh. 16). Handbills (G.C. Exhs. 17-25) were distributed reflecting meetings held or to be held by LCDs on various dates in July, August, and September 1980 in order to attempt to deal collectively with the Charging Parties taxicab companies so as to achieve more equitable or advantageous taxicab lease/rental terms. There is no doubt that the picketing activity has been effective in reducing the volume of taxicabs leased by LCDs from the Charging Parties, with substantial losses of revenue to the Charging Parties[8] (to say nothing of losses of revenue to the nonleasing LCDs).

With only a single, brief, and unintended exception,[9] at no time were any of the picketing efforts staged, aimed, or beamed at any of the Charging Parties' commission drivers or other employees or at any persons other than the Charging Parties themselves and

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[7] Although commission drivers and inside employees could hardly have been misled since they were firmly represented by another union of their own, the Seafarers, under a subsisting collective agreement, and the picketing was (with the sole incidental exceptions described and dealt with infra) limited to garages housing only LCD-operated vehicles, nevertheless, according to testimony of the General Counsel's witness Stroud, an official of Respondents, use of this particular sign was unauthorized and was discontinued by Respondents immediately on discovery within a day or less after it was displayed.

[8] Estimated by Yellow Cab President Logue at over $300,000 out of gross annual revenues exceeding $22 million and by Checker Taxi President Feldman at over $250,000 out of gross annual revenues of $16 million although the diminution by the trial date was only 5 percent (or 400 leases per week).

[9] This occurred at the very inception of the picketing, around 5:30 a.m. on August 12, 1980, at Yellow Cab's South Indiana Avenue garage housing only vehicles of its commission driver employees. As soon as an official of the Seafarers Union arrived shortly thereafter and explained that the garage housed no LCD-operated vehicles, the LCD pickets left at once. The entire incident—clearly an unintended error—lasted no more than possibly a half-hour.

their potential LCDs—neither to organize them, nor to solicit their membership in or support of Respondents, nor to seek to persuade them to cease, interrupt, or otherwise interfere with their work, work arrangements, relationships, or deliveries.

Although there is ample evidence, some undisputed and persuasive, that *nonpicket-related* acts of violence[10] occurred at various street locations during the period of the effort by the LCDs to get the Charging Parties to agree to discuss their lease terms, this is not alleged in the consolidated complaint as violative of the Act on the part of Respondents; nor is there substantial evidence persuasively linking those acts to Respondents. It is also undisputed that, during part of the picketing period, a few of the Charging Parties' suppliers' employees, apparently unwilling to cross the picket "line," failed to make deliveries (or, in one case, a pickup).

On September 9, 1980, the Board's Acting Regional Director in Chicago, with whom the charges here had been filed a week earlier, petitioned the U.S. District Court for the Northern District of Illinois, Eastern Division, for a temporary injunction under Section 10(1) of the Act pending final disposition of the instant proceeding (G.C. Exhs. 7-10). On December 11, 1980, the petition was denied (ALJ Exhs. 1-3).[11] An injunction proceeding had also been commenced in the Circuit Court of Cook

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[10] Including much windshield smashing and threats by wholly unidentified persons, as well as by one or two LCDs, and also much tire slashing, as well as arson, to cabs. On one occasion at Checker's North Pulaski garage, police were called to disperse a large, nonviolent group allegedly interdicting access to the garage while exclaiming, "Don't ride Checker and Yellow. They are unsafe cars."

[11] Although U.S. District Judge Prentice Marshall's decision (ALJ Exh. 2) appears to be based, at least in part, upon his belief that the LCDs were employees or their "equivalent" within the contemplation of the Act, the complaint here (par. II[g]) alleges, all of the parties agree, and the U.S. court of appeals (fn. 5, supra) had determined the opposite. In any event, Judge Marshall's decision is not dispositive here. *NLRB v. Denver Building & Construction Trades Council*, 341 U.S. 675, 681-683 (1951).

County, Illinois, by the two taxicab companies who are the Charging Parties here against Respondents, their officials, and all LCDs acting in concert. On September 8, 1980, following a trial in which some 1384 pages of transcript were taken, Judge George A. Higgins of the court denied plaintiffs' application for a temporary injunction (R. Exh. 3), among other things concluding (id. at 1378-79):

> . . . that the individual Defendants and all Lease Drivers have the Constitutional Right to picket in a peaceful and lawful manner on the public way as a means of communicating complaints and grievances, and that they have the right to engage the services of the Defendant Union to assist them in their endeavors, and that these rights, under the First Amendment to the Constitution of the United States cannot be enjoined or otherwise denied.

On December 31, 1980, this decision was unanimously affirmed by the Illinois Appellate Court (ALJ Exh. 5), which in part stated "that the plaintiffs failed to establish an illegal purpose for the defendants' actions" and that:

> . . . [t]he [trial] court found that there was no evidentiary connection between the acts of violence cited by the plaintiffs and the lawsuit before it. The parties introduced sharply conflicting testimony concerning the extent and nature of the violence which occurred. . . . The defendants offered testimony that the Union opposed the violence and even offered a reward for information leading to the arrest of those who committed violent acts. We believe that the evidence supports the trial court's finding that there was no nexus between the alleged violent acts and the defendants in this cause.[12]

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[12] While these determinations are likewise not dispositive herein, we have been instructed to accord them deserving weight. *Mitchell Plastics*, 117 NLRB 597, 598 fn. 1 (1957), enfd. as modified 260 F.2d 472 (6th Cir. 1958); *Seyfert Foods Co.*, 109 NLRB 800, 810 fn. 5 (1954); *Sun Co. San Bernardino, California*, 105 NLRB 515, 521 (1953), enfd. as modified 215 F.2d 379 (9th Cir. 1954); *Aerovox Corp.*, 104 NLRB 246,

B. Discussion and Resolution

1. The basic question: legality of the picketing

The Charging Parties, owners-franchisees of predominating portions of the Chicago taxicab fleet, have during the past several years altered their basic method of operation from employing their own drivers to drive their fleet to leasing out their cabs, usually on a daily basis, to individual cab drivers who are concededly not employees as defined by the Act but independent contractors not within the Act's coverage. Dissatisfied with the cab-leasing terms imposed on them, substantially similarly, by the taxicab companies, the leased cab drivers have attempted, through Respondent Unions as their advisers presumably skilled in negotiating, to deal collectively with the taxicab companies in order to obtain more favorable lease terms. The taxicab companies have refused to negotiate, claiming they are not obligated to do so since the leased cab drivers are not employees under the Act, which is not applicable to them. When the organized leased cab drivers, carrying banners containing Respondents' name, thereupon picketed the taxicab companies at their cab storage garages in an attempt to compel them to negotiate and in order to persuade other potential cab lessee-drivers not to rent cabs until such negotiations occurred, the taxicab companies sought to invoke the Act as allegedly applicable to that activity by filing charges against Respondents alleging that the picketing constituted a secondary boycott in violation of Section 8(b)(4)(i) and (ii)(B) of the Act. This presents the threshold issue here, i.e., whether the described picketing violates Section 8(b)(4)(i) or (ii)(B). After close consideration, I have concluded that it does not.

Section 8(b)(4)(i) and (ii)(B) makes it an unfair *labor* practice for a labor organization or its agents:

> (4)(i) to engage in, or to induce or encourage any individual *employed* by any person engaged in commerce or in an industry affecting commerce to engage in, a *strike* or a *refusal* in the course of his *employment* to use, manufacture,

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247 (1953), enfd. 211 F.2d 640 (D.C. Cir. 1954), cert. denied 347 U.S. 968 (1954); *Nashville Corp.*, 94 NLRB 1567, 1568-69 (1951).

process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

. . . .

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his *employees* unless such labor organization has been certified as the representative of such *employees* under the provisions of section 9: *Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing.* [*Emphasis added.*]

The basic question presented, i.e., whether the picketing here was in violation of Section 8(b)(4)(i) and (ii)(B), appears to be novel; no case directly in point has been cited by counsel. Thus, the Charging Parties' counsel's impressively scholarly 90-page brief arrays cases for the most part dealing with conventional secondary boycott situations in one way or another involving traditional employer-employee relationships, with attempted embroilment of another employer or employees alien to the controversy, within the frame of reference of traditional industrial disputes,[13] without providing a single case dispositive of the

[13] With a few cases, heavily relied on by the Charging Parties, seemingly *sui generis* because of the perhaps unique configurations of the prevailing extraordinary and ambivalent jural relationships at various levels among "employed," "employers," and "employees" (or even both simultaneously), "contractors," "subcontractors," "hirers," and "users" as in the highly singular, *Janus*-like performing arts (music; ballet) field. Cf. *Musicians Local 16 (Manor, Inc.)*, 206 NLRB 581 (1973), enfd. 512 F.2d 911 (D.C. Cir. 1975); *Musical Artists (National Symphony Orchestra Assn.)*, 157 NLRB 735 (1966).

principal issue here. Since of the myriad of cases assembled none is dispositive or substantially assistive, it would serve no useful purpose to indulge in a harrowing beating through the thicket only to point out repetitively that each cited case thus differs from the described *non*employer-employee, *non*industrial relations dispute situation here, seemingly for the first time in Board annals, presented.

At the threshold, it is clear that the mere *colloquium, joinder*, association, or organization of the LCDs for dealing collectively with the taxicab companies was not violative of the Act, since the Act contains no proscription of such activity. See *National Woodwork Mfrs. v. NLRB*, 386 U.S. 612, 645 (1967). Beyond this, as to the picketing, certainly the prohibitions of the Act should be read with an eye cocked toward its purposes:

> The most universal and effectual way of discovering the true meaning of a law, when the words are dubious, is by considering the reason and spirit of it, or the cause which moved the legislator to enact it. [1 W. Blackstone *Commentaries* 61.]

It cannot be without significance that the introductory "declaration of policy" of the 1947 "Labor Management Relations Act" is couched in terms of the interrelationship of "*employers, employees*, and labor organizations," the "rights of both *employees* and *employers*," and the regulation of "practices on the part of *labor and management*" (1947 Act, Sec. 1; emphasis added); nor can it be devoid of design that the basic frame of reference constituting the "Findings and Policies" of the Act is likewise cast in terms of pacification of tensions between "employers" and "employees" (Sec. 1, as amended by 1947 Act, Sec. 101). Nowhere is any legislative purpose to be found in or gleaned from the Act to regulate the relationships between entrepreneurs as distinguished from those between employers and employees (and labor organizations as proxies of employees). It is conceded by the parties here that the leased cab drivers on whose behalf Respondents sought to negotiate improved lease terms are not employees but independent contractors or entrepreneurs, whose entry into leasing arrangements with the taxicab companies was entirely optional on the part of both the lessees and the lessors. Thus, the

attempt by the leased cab drivers to obtain more favorable lease terms, and failing that to withhold their trade if the existing less favorable leases were not ameliorated, meanwhile publicizing that endeavor through first amendment-protected communicatory picketing, may hardly be regarded, even with inordinate linguistic stretching, to constitute that unfair *labor* practice by a labor organization in that situation representing *employees* "refus[ing] in the course of [their] *employment* . . . [to] handle or work on any goods . . . or to perform any services" (Act, Sec. 8(b)(4)(i) supra), within the proscription of the Labor Act's provision here invoked.

Since there is concededly no employer-employee relationship between the primary contestants here (i.e., the leased cab drivers and the taxicab companies)[14] nor employee-employer strife requiring pacification through the processes of the Board for any of the reasons recited in the preamble of the Act, I am unable to discern how Respondents' picketing here falls under the umbrella of the Act's purposes or proscriptions. While it may be argued—in what appears to be a somewhat wooden or gunbarrel reading of selected words of Section 8(b)(4)(i) and (ii)(B)[15]—

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[14] The amended Act explicitly excludes "independent contractor" from its definition of "employee." Act, Sec. 2(3).

[15] *Qui haeret in litera haeret in cortice.* As stated by Chief Judge Sobeloff in *NLRB v. Longshoremen ILA (Ocean Shipping)*, 332 F.2d 992 at 997 (4th Cir. 1964), "Section 8(b)(4) must be interpreted, not merely read literally," citing *Electrical Workers IUE Local 761 v. NLRB*, 366 U.S. 667, 672 (1961), and Lesnick, *The Gravamen of the Secondary Boycott*, 62 Colum. L. Rev. 1363 (1962). Cf. also *NLRB v. Fruit Packers*, 377 U.S. 58, 63-73 (1964), citing *Holy Trinity Church v. U.S.*, 143 U.S. 457, 459 (1892), in which the Court had pointed out:

> It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers. This has been often asserted, and the reports are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the legislator; for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its

that that provision is applicable to the situation here per se simply because a labor organization is involved and charged, as distinguished from the leased cab drivers themselves, such an interpretation appears to be strained and out of keeping with the declared purposes of the Act. The labor organizations here functioned at most as advisers of the independently contracting, entrepreneurial leased cab drivers who were their principals, and whom they represented—in a segregated groupment known as the *Leased Taxicab Drivers Division* not commingled with the membership at large of the Unions—not as employees but only because those entrepreneurs had invoked their assistance as presumed experts in the negotiating art. Since there was no labor dispute here[16] and the activities of Respondents were simply not those of a labor organization qua labor organization, the picketing for improved

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enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act.

[16] "The Act has been interpreted as conferring Board jurisdiction over a variety of labor matters, but there can be no jurisdiction where the complaint presents a controversy unrelated to the resolution of a 'labor dispute' as defined.... Not every activity of a labor organization, not even every controversy in which it may become involved, is a 'labor dispute' within the statutory meaning.... [Here the union, which declined to supply members to work on ships carrying on trade with Cuba (characterized by the court as 'a general political question,' 332 F.2d at 996)] is not seeking to alter any terms or conditions of employment." *NLRB v. Longshoremen ILA Local 1335 (Ocean Shipping)*, supra at 995-996. In par. 5(g) of his September 9, 1980 petition to the U.S. District Court for a preliminary injunction herein (fn. 2, supra), the Board's Acting Regional Director expressly asserted that "[a]t no times material herein have Respondents [the Unions] been engaged in a labor dispute with the [taxicab] Companies." (G.C. Exh. 7, p. 4.) It is to be noted that the Act's definition of "labor dispute" (Act, Sec. 2(9)) is couched in terms of "any controversy concerning terms, tenure or conditions of *employment*, or concerning the association or representation of persons in negotiating ... or seeking to arrange terms or conditions of *employment*," even though the immediate "*disputants* [do not] stand in the proximate relation of employer and employee" (id., emphasis added). Cf. also *Woodwork Mfrs. v. NLRB*, 386 U.S. 612 at 645 (1967).

leases does not fall comfortably within the regulatory prescription of the Act, and I do not believe it should be deposited or engrafted there by administrative-judicial fiat. Cf. *NLRB v. Longshoremen ILA (Ocean Shipping)* and *National Woodwork Mfrs. v. NLRB*, supra at fn. 16.

There is a further answer to the argument that the picketing was violative of the Act because it was "connected" with Respondents labor organizations, although it would not have been if it had been carried out merely by their principals, the leased cab drivers. Just as the Act was not intended to regulate the behavior of employers generally, but only certain aspects of their relationships with employees and their representatives, so, too, the Act was not intended to regulate the behavior of labor organizations generally, but only certain aspects of their *employee vis-a-vis employer* related activities. It is admitted, indeed even alleged, here that no employer-employee relationship existed between the Charging Parties taxicab companies and the leased cab drivers, the independent contractors who had enlisted the supposed negotiating expertise—but not qua labor union in relation to themselves—of Respondents. The Act does not prevent labor organizations from advising or representing persons, groups, or other organizations who are not employees or in matters which are not employment related. Nor does the Act place any ban on the picketing of even employers by independent contractors (or their agents), whether the latter be customers, buyers, sellers, lessors, or lessees; nor of independent contractors by other independent contractors. Nor does it circumscribe the freedom of expression of labor organizations in, at any rate, matters unrelated to labor disputes, nor otherwise curb first amendment guarantees. Cf., e.g., *Steelworkers Local 14055 v. NLRB*, 524 F.2d 853 (D.C. Cir. 1975), remanded for reconsideration under changed circumstances 429 U.S. 807 (1976). The Act is not a full-scale "Emily Post" behavioral capsule covering everything a labor organization may or may not do. *NLRB v. Longshoremen ILA Local 1335 (Ocean Shipping)*, supra. It would seem, for example, that for a labor organization not representing employees in any labor controversy to boycott or picket a real estate landlord or a rental car lessor to attempt to persuade him to reduce his rent or grant more favorable lease terms, or to picket a merchant to reduce his prices,

or even secondarily to picket a customer of a bank with an object of compelling the bank to reduce its interest rates would no more violate the Act than if any other person—employer, lessee, potential lessee, customer, or agricultural worker not within the Act's coverage—did so, as they indeed have on innumerable occasions. Although the picketing of the taxicab companies here was "primary" and limited to primary sites (i.e., business locations of the Charging Parties themselves) in that it was beamed at the parties directly involved, while also not within an employment-related "labor dispute" context,[17] it is to be noted that not all secondary boycott or picket activity, even within a "labor dispute" configuration, is violative of the Act. Cf. *NLRB v. Fruit Packers*, 377 U.S. 58 (1964); *NLRB v. International Rice Milling Co.*, 341 U.S. 665, 672-673 (1951). Existence of an objective proscribed by the Act may not be inferred on the basis of picketing alone. Cf. *Houston Building Trades Council* (*Everett Construction*), 136 NLRB 321, 323-324 (1962); *Laborers Local 41* (*Calumet Contractors*), 133 NLRB 512, 513 (1961). Were this otherwise, grave constitutional questions would arise. It is a cardinal principle of statutory construction to avoid, if at all possible, resolving a case on the basis of determining a constitutional question.[18]

A union, in its activities in support or on behalf of persons or causes not within the protection or prohibition of the Act, is entitled to exercise its first amendment and other constitutional rights like any other individual or organization. Since the actions of Respondent Unions here were solely on behalf of persons (i.e.,

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[17] It is reemphasized that the Act's definition of "labor dispute" is cast in terms of controversies concerned with "*employment.*" NLRA, Sec. 2(9), emphasis added.

[18] Cf., e.g., *Steelworkers Local 14055 v. NLRB*, supra; *Nebbia v. New York*, 291 U.S. 502, 537-539 (1934); *People v. Barber*, 289 N.Y. 378 (1943); *Johnson v. City of New York*, 274 N.Y. 411 (1973); *Tauza v. Susquehanna Coal Co.*, 220 N.Y. 259 (1917). Statutes are presumed constitutional. *Butterfield v. Stranahan*, 192 U.S. 470, 493 (1904). And it is not for an agency created by statute to assail its own legislative birth certificate as unconstitutional. Cf. *U.S. v. Butler*, 297 U.S. 1 (1936); *Panitz v. District of Columbia*, 112 F.2d 39, 41-42 (D.C. Cir. 1940).

leased cab driver entrepreneurs) explicitly excluded from the definition of employees under the Act, and solely in furtherance of ends sought by those nonemployees not concerning any aspect of an employment relationship, they were of that category. I accordingly conclude that it was not violative of the Act for the entrepreneurial cab drivers, acting in concert or counseled by Respondents, not to lease cabs from the Charging Parties' taxicab companies, or for them or Respondents to attempt through picketing and handbilling to persuade other potential entrepreneurial cab lessees not to lease cabs from those companies, until the companies bargained about the lease terms. It would be a strange anomaly if the Act that was intended to free employees to organize for collective action toward employers were permitted to be turned against consumers or lessees organizing for collective action toward their suppliers or lessors. No basis has been shown to attribute any such purpose, as is now essayed in this novel proceeding, to the framers of the Act. Cf. *NLRB v. Longshoremen ILA* (*Ocean Shipping*), supra. If Congress had intended to brand activity of this kind illegal, with the attendant stringent if not quasicriminal penalties, it could readily have said so in plain words, obviating the necessity for the tortuous statutory constructions here advanced to support the prosecution's case. "It is a rule of statutory construction that a *casus omissus* cannot be supplied by the courts." McCaffrey, *Statutory Construction* 25. Cf. *Levberg v. Schumacher*, 225 N.Y. 167 (1919). Respondents are correct in maintaining that the burden is not on them to establish the inapplicability of the Act or that their actions were not unlawful.

For the foregoing reasons, it is concluded that the picketing activities here did not fall within the purview, and were therefore not violative, of the Act.

2. Other incidents

It remains to consider whether various incidents, some arguably related to and others clearly unrelated to the picketing, were violative of Section 8(b)(4)(i) or (ii)(B).

We begin with a strong condemnation of any violence of the type which occurred. While it is clear that such incidents call for police action, it does not follow that they therefore constitute violation by Respondents of Section 8(b)(4) of the Act. Cf. *NLRB v. International Rice Milling Co.*, supra at 671-672 (1951). It needs no saying that all kinds of criminal acts are, unfortunately, constantly occurring, but that the mere commission of crime, even by a union, does not necessarily constitute a violation of the particular Act under which this proceeding is required to be judged.

It is to be noted that the consolidated complaint does not even allege that Respondents committed, are responsible for, or violated the Act through any violent acts. Further, however, as in the lengthy case tried before the Circuit Court of Cook County and affirmed by the Illinois Appellate Court (supra), there is simply an absence of substantial evidence linking Respondents to any act of violence here. The gap cannot be supplied through suspicion, surmise, or conjecture, particularly since serious crime is involved and Respondents are entitled to the benefit of a presumption of innocence. This proceeding is governed by the Administrative Procedure Act, which requires that findings and conclusions be based on substantial credible evidence,[19] lacking here insofar as providing reliably persuasive linkage of any violent acts to Respondents. Indeed, none of the violence has been shown to have been picket-related. Under these circumstances, to pronounce Respondents guilty of serious violent crime here would find no adequate support in the record.[20]

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[19] Administrative Procedure Act, 5 U.S.C. §§ 556(d) and 706(2)(E); *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229, 230 (1938); *Willapoint Oysters v. Ewing*, 174 F.2d 676, 690, 691 (9th Cir. 1949), cert. denied 338 U.S. 860 (1949); *NLRB v. Bell Oil & Gas Co.*, 98 F.2d 406, 410 (5th Cir. 1938); *NLRB v. A. S. Abell Co.*, 97 F.2d 951, 958 (4th Cir. 1938). Cf. *Blue Flash Express*, 109 NLRB 591, 592 (1954); Attorney General's Manual on the Administrative Procedure Act 75 (1947).

[20] It is strongly emphasized that disorderly or criminal conduct, whether or not connected with picketing, is in no manner here condoned, but, on the contrary, deplored and denounced. Such conduct should be

With regard to the alleged failure of some "commission drivers" in the employ of the taxicab companies to report for work or cross the picket "lines" here, and of a few merchandise suppliers to make some expected deliveries (and one service company to make a usual call), it is to be emphasized at the outset that the picketing was in no way beamed at them and that they were not among its objects. The commission drivers as well as all "inside" maintenance and service employees of the taxi-cab companies were and are represented by the Seafarers Union, and no organizational objective is attributed to Respondents. If any of these persons elected on occasion not to report for work, whatever the reason or reasons may have been (not here shown through the testimony of any of them), or even not to cross a picket line because of some perhaps strongly held or perhaps misperceived (depending on the point of view) "general principle" which some unionists and others choose to avow, that hardly supports a finding of illegality here, since such was not an object of the picketing; to hold otherwise would substitute possible *effect* for the Act's test of *object*, or to suppose object solely from possible effect. Cf., e.g., *International Rice Milling Co.*, supra; *Baldovin v. Longshoremen ILA*, 626 F.2d 445 (5th Cir. 1980); *Maritime Union (Shippers Stevedoring)*, 245 NLRB 149 (1979).

This leaves only, as meriting mention, the isolated incident at Yellow Cab's South Indiana Avenue garage which, although housing only cabs of commission drivers, was inadvertently picketed for perhaps a half hour at the very outset of the picketing activity around 5:30 a.m. on August 12, 1980, but which was immediately discontinued (without repetition) when the error was pointed out. Under the circumstances, such an isolated and almost immediately rectified and unreiterated error may hardly be deemed to warrant extension of the Board's strong remedial arm.

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reported to local police or other law enforcement authoritites for investigation and prosecution in the usual way. As for the occasional colorful or exuberant language ascribed to some pickets here, it appears to have been little more than the usual outcropping—on both sides—of a rancorous situation exacerbated by the refusal of one side to even listen to or talk with the other. Cf., e.g., *NLRB v. International Rice Milling Co.*, supra at 670-673.

In sum: Here the direct, primary, and only dispute of the leased cabdriving entrepreneurs, represented by Respondents not as a labor union but only for technical advisory purposes, was with the taxicab companies, which refused to negotiate regarding the terms on which they were leasing their cabs to the cabdriving entrepreneuers. This was the only reason the taxicab companies were being picketed. Obviously it was not and could not have been "an object" of that picketing to force or require the taxicab companies to cease doing business with the leased cabdrivers, since the taxicab companies were perfectly willing to continue leasing cabs to the drivers on the existing companies-imposed terms. Nor was an object of the entrepreneurial picketing, purposed to achieve more favorable leases, to induce or encourage leased cabdriver entrepreneurs to cease using the cabs of or to do business with the taxicab companies, violative of Section 8(b)(4)(B), since, not being employees, they were not engaging and could not engage in or induce or encourage other cabdriving entrepreneurs to engage in "a strike or a refusal in the course of [their] *employment* to use . . . or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services" (Act, Sec. 8(b)(4)(i); emphasis added); nor did or could they "threaten, coerce, or restrain" the overwhelming number of leased cabdriving entrepreneurs who had made common cause with them, as well as those who perhaps had not, to "cease" doing business with the taxicab companies or force or require . . . any *other* employer to recognize or bargain with a labor organization as the representative of his *employees*" (id., Sec. 8(b)(4)(ii)(B); emphasis added.) The direct and primary dispute remained with the taxicab companies, at their own site locations. The picketing was not purposed to make the taxicab companies stop leasing cabs to the pickets or others; nor was it an object of the picketing to "force or require" leased cabdriving entrepreneurs to stop doing business with the taxicab companies, but merely to urge them as fellow entrepreneurs to withhold their trade until the taxicab companies were willing to discuss, rather than impose, lease terms; and, finally, even if an object had been to "force or require" some entrepreneurial leased cabdrivers to withhold their trade, it would still not have been violative of the Act, since the entire issue concerning lease terms was not in an

employment or industrial relations context within the declared purposes or *schema* of the Act. Insofar as any effect of the picketing on the taxicab companies' commission driver employees was concerned, concededly it had no organizational objective and, I find, it was not an object thereof to enmesh them in any way violative of the Act, any work interruption on their part not having been established by substantial credible evidence (as through the testimony of even a single such employee) to have been other than uncoerced, voluntary, or an incidental effect or byproduct of the lawful picketing. Insofar as violent and disorderly acts are concerned, while not alleged in the consolidated complaint as violative of the Act, they have in any event not been established by substantial credible evidence to have been committed by, at the direction of, or with the authorization, connivance, or approbation of Respondents; and they should be dealt with through the local law enforcement machinery.

For these reasons, I have concluded that the consolidated complaint should be dismissed in its entirety.

Conclusions of Law

1. Jurisdiction is properly asserted herein over the persons of the parties to this proceeding.

2. The leased taxicab drivers of each of the Charging Parties taxicab companies, who have been picketing the Charging Parties and on whose behalf Respondents sought to negotiate with the Charging Parties, have in the inception, purpose, course, and conduct of that picketing been and continue to be independent contractors and customers of the Charging Parties and not employees within the meaning of the Act.

3. Said picketing activities of said leased taxicab drivers and insofar as participated in by Respondents were and are in lawful exercise of constitutionally guaranteed rights of said leased taxicab drivers and of Respondents, in pursuance of a primary economic contention between independently contracting taxicab-driving entrepreneurs and the Charging Parties concerning terms, provisions, and conditions governing the rental of taxicabs owned by and franchised to the Charging Parties.

4. Jursidiction is not properly asserted herein over the subject matter of the said picketing activities of Respondents seeking to achieve more favorable leasing arrangements on behalf of said independently contracting taxicab-driving entrepreneurs with the Charging Parties.

5. Said picketing activities have not been and are not in violation of the Act.

6. It has not been established by substantial credible evidence that Respondents have violated the Act in any other respect alleged in the consolidated complaint.

7. For the reasons set forth in section III, supra, the consolidated complaint should be dismissed.

[Recommended Order for dismissal omitted from publication.]

Appendix E

Production Workers Union of Chicago and Vicinity, Local 707, et al., Petitioners,

v.

National Labor Relations Board, Respondent,

Checker Taxi Company, Inc. and Yellow Cab Company, Inc., Intervenors.

No. 85-1078.

United States Court of Appeals, District of Columbia Circuit.

Argued March 18, 1986.

Decided June 13, 1986.

Petition for Review of an Order of the National Labor Relations Board.

Michael M. Conway, with whom Michael Schneiderman, Antony S. Burt, and Jeremiah Marsh, Chicago, Ill., were on brief, for petitioners.

Peter Winkler, Atty., N.L.R.B., with whom Elliot Moore, Deputy Associate Gen. Counsel, N.L.R.B., Washington, D.C., was on brief, for respondent.

Robert E. Haythorne, Geneva, Ill., for intervenors.

Before GINSBURG, SCALIA and BUCKLEY, Circuit Judges.

Opinion for the Court filed by Circuit Judge GINSBURG.

GINSBURG, Circuit Judge:

This case calls upon us to decide whether Section 8(b)(4) of the National Labor Relations Act (NLRA or Act), 29 U.S.C. § 158(b)(4)—which for decades has been dubbed the "secondary boycott provision" in scores of judicial opinions, administrative decisions, law review articles, treatises, casebooks, and law school classrooms—prohibits union involvement in all picketing

by or on behalf of independent contractors, even picketing that is not secondary because not directed against a neutral third party. The Production Workers Union of Chicago and Vicinity, Local 707 (Union) seeks review of a National Labor Relations Board (NLRB or Board) order concluding that the Union violated Section 8(b)(4) by helping certain independent contractors picket their general contractor for better contractual terms.

Without considering whether the general contractor was a neutral third party, the Board held that Section 8(b)(4) proscribes labor organization participation in all picketing by independent contractors. We hold that in so ruling, the Board has attempted to enlarge the office of Section 8(b)(4) without statutory authority or caselaw support. It was the express intent of Congress, as authoritative precedent observes and affirms, to confine the "secondary boycott provision" to the protection of "unoffending [entities] from pressures and controversies not their own." *NLRB v. Denver Building & Construction Trades Council*, 341 U.S. 675, 692, 71 S.Ct. 943, 953, 95 L.Ed 1284 (1951).

I. Background

Intervenors Checker Taxi Company (Checker) and Yellow Taxi Company (Yellow) are the principal cab companies operating in Chicago, Illinois; together, they own approximately 80% of all the cabs licensed to operate in that city. Before 1975, these companies employed commissoned drivers, who were statutory employees under the Act and were collectively represented by Local 777 of the Seafarers International Union. In 1975, however, Checker and Yellow began to replace these commissioned drivers with drivers who lease cabs from the cab companies. This court held that these leased cab drivers (LCDs) are not statutory employees and that the cab companies are therefore under no legal obligation to bargain with them. *See Local 777, Seafarers International Union v. NLRB*, 603 F.2d 862 (D.C. Cir. 1978). Today, Yellow and Checker use an overwhelming majority of LCDs rather than commissioned drivers.

After our *Seafarers* opinion, LCDs became dissatisfied with what they regarded as increasingly onerous lease terms. Eventu-

ally, they began to organize in hopes that the cab companies would voluntarily agree to deal collectively with them. By early July 1980, the leader of the drivers seeking better lease terms, Reverend Joseph Jerry McAfee, had enlisted about 1200 fellow LCDs. He then consulted with the Union to gain the benefit of its expertise in labor organization and collective representation; by early August, the Leased Taxicab Division of Local 707 of the Production Workers Union had been created. On August 7, the LCDs dissatisfied with the term of their leases met and decided to attempt negotiations with the cab companies; they further determined, if the companies refused to negotiate, to stop work and picket. On August 8, the Union wrote to Yellow and Checker requesting the companies to recognize and deal with the Division. The cab companies refused and have consistently maintained that they will never recognize the Division.

On August 12, the LCDs and some Union officials began to picket garages of the cab companies. Yellow and Checker maintain two types of garages: one type houses only cabs driven by LCDs; the other houses cabs driven by commissioned drivers. Except for one brief incident, the LCDs confined their picketing to the garages that housed only vehicles operated by LCDs. The exceptional incident occurred at the very beginning of the picketing, early on the morning of August 12, when the LCDs began to picket Yellow Cab's South Indiana Avenue garage. An official of the Seafarers Union soon arrived and explained that only commissioned drivers worked at that garage. Once informed that the garage was for commissioned drivers, the LCDs left immediately. The whole incident lasted less than thirty minutes.

In September, Yellow and Checker filed unfair labor practice charges against the Union under Section 8(b)(4).[1] The NLRB

[1] The cab companies brought several actions in other tribunals at about the same time. First, they sued in Illinois state court, alleging that the Union's picketing violated the Illinois Antitrust Act and Illinios tort law. The trial court denied the companies' motion for a preliminary injunction, and the appellate court affirmed. *See Yellow Cab Company v. Production Workers Union of Chicago and Vicinity, Local 707*, 92 Ill.App.3d 355, 48 Ill.Dec. 153, 416 N.E.2d. 48 (Ill.App.Ct. 1980).

Administrative Law Judge (ALJ) assigned to the case conducted a hearing, and on March 9, 1981, he issued a decision and order dismissing the complaint. The ALJ held that the LCDs' picketing fell entirely outside the ambit of the Act because it involved no employer-employee relationship or a labor union acting *qua* labor union (as opposed to acting *qua* advisor to the LCDs); hence the cab companies' charges failed to present a labor dispute falling within the NLRB's subject-matter jurisdiction. *See Production Workers Union of Chicago and Vicinity, Local 707*, Case Nos. 13-CC-1159 and 13-CC-1160 (Mar. 9, 1981), Joint Appendix (J.A.) at 18, 28-31 (*ALJ Opinion*).

On December 18, 1984—after a delay of over three and one-half years—a three-member panel, to whom the NLRB had delegated the decision, rejected the ALJ's view of the case. The panel's opinion first concludes that the unfair labor practice complaint does fall within the NLRA's domain because it was brought against a statutory labor organization. Passing to the merits, the opinion initially acknowledges that the standard case Section 8(b)(4) addresses, as illustrated in the legislative history, is one "in which the union's activity is directed toward a neutral employer in order to pressure another employer whose employees the union seeks to represent or benefit." The matter at hand, the opinion concedes, "is clearly not" such a case.

But Section 8(b)(4) is an intentionally broad provision, the opinion continues; and although the term "secondary boycott" is "generally used as a shorthand reference to the conduct forbidden

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Second, the companies sued in federal district court, again seeking a preliminary injunction, this time under Section 10(1) of the Act, 29 U.S.C. § 160(1), alleging, as they do here, that the picketing violated Section 8(b)(4). The District Court denied the preliminary injunction motion, reasoning that the LCDs "are tantamcunt to being employees of" Yellow and Checker, thus their picketing was "for a primary object." *See Crawford v. Production Workers Union of Chicago and Vicinity, Local 707*, No. 80 C-4819, slip. op. at 5 (N.D.Ill. Dec. 11, 1980). Finally, the cab companies commenced an action against the Union for damages under Section 303 of the Act, 29 U.S.C. § 187. That case is still pending. *Checker Taxi Co. v. National Production Workers Union*, No. 80 C-6573 (N.C.Ill.)

by" the section, such a broadly drafted provision should not be limited by a term that nowhere actually occurs in the statute. Instead, interpretation should be guided by the purposes animating the provision. Since the LCDs are not statutory employees, the opinion maintains, their picketing does not advance one of the section's primary purposes: promoting the right of labor organizations to bring pressure to bear on offending employers in labor disputes. The panel therefore demanded "strong indication" that Section 8(b)(4)'s express permission of "primary picketing" includes picketing in aid of independent contractors. The opinion concludes, on the contrary, that "no [such] implication [exists] in either the legislative history or case precedent." Based on this conclusion, the panel ordered the Union to cease and desist from picketing, and to post notices of the Board's decision. *See Production Workers Union of Chicago and Vicinity, Local 707*, 723 N.L.R.B. No. 148 at 5-11. (Dec. 14, 1984) (*Production Workers*).

II. Jurisdiction

The Union argues, and the ALJ agreed, that the NLRB lacks adjudicatory authority in this case because it involves no statutory employees and therefore entails no labor dispute within the ambit of Section 2(9) of the Act, 29 U.S.C. § 152(9). *See* Final Brief of the Production Workers Union, *et al.*, at 28-30; *ALJ Opinion*, J.A. at 28-32. The law of this circuit is clear, however, that Section 2(9) does not circumscribe the Board's jurisdiction; rather, it merely defines the term "labor dispute" as it appears elsewhere in the statute. The Board's task was not "to pause at the threshold to identify a conventional labor dispute"; it was instead, "to measure the union's conduct against specific provisions of the Act defining unfair labor practices." *Soft Drink Workers Union Local 812 v. NLRB*, 657 F.2d 1252, 1258 (D.C. Cir. 1980). We therefore uphold the Board's ruling that it had jurisdiction to consider whether the Union's picketing violated Section 8(b)(4).

III. The Merits

We reject, however, the central premise of the NLRB's order. The Board erroneously concluded that Section 8(b)(4) prohibits union involvement in all picketing by or on behalf of independent contractors. Rather, that section prohibits only "secondary activity": union attempts to involve neutral third parties in disputes not their own. *See, e.g., National Woodwork Manufacturers Association v. NLRB (National Woodwork)*, 386 U.S. 612, 624-26, 87 S.Ct. 1250, 1257-58, 18 L.Ed.2d 357 (1967); *United Scenic Artists, Local 829 v. NLRB*, 762 F.2d 1027, 1032-33 (D.C. Cir. 1985). The provision would therefore bar the Union-aided picketing at issue only if the picketing were directed against a neutral third party in this dispute.[2]

A. The Board's Opinion

Section 8(b)(4), stripped to its relevant essentials, provides that it shall be an unfair labor practice for a union (i) to induce an employee to refuse to work or (ii) to threaten, coerce or restrain any person, if an object of the behavior described in (i) or (ii) is "(B) forcing or requiring any person to cease doing business with any other person . . . Provided that nothing in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing." The NLRB concluded in the present case that the Union's picketing

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[2] In a recent case with almost identical underlying facts, the Regional Director of the NLRB petitioned the Northern District of California for a preliminary injunction against picketing by independent contractors. The Regional Director argued, as does the NLRB here, that Section 8(b)(4) bans union participation in all picketing on behalf of independent contractors. In reasoning very similar to that adopted in this opinion, the court denied the petition. *See Scott v. Brotherhood of Teamsters and Auto Truck Drivers, Local No. 70 of Alameda County*, 633 F.Supp. 121 (N.D. Cal. 1985). The Ninth Circuit has since issued an unadorned order granting the Regional Director's motion for an injunction pending an expedited appeal, and thereafter, an order with consent of counsel staying the appeal until April 30, 1986, or the issuance of this opinion. *See Scott v. Local No. 70*, No 85-2753 (9th Cir. Nov. 11, 1985) (order granting injunction pending appeal) and (9th Cir. Feb. 6, 1986) (order staying appeal).

of the LCD garages was an attempt to coerce the other LCDs to cease doing business with Yellow and Checker and so was a violation of Section 8(b)(4)(ii)(B). The Board also concluded the Union's picketing of the South Indiana garage, which housed only vehicles operated by commissioned drivers, was an attempt to induce those employees to stop work, with the object to require them to cease doing business with the cab companies in violation of Section 8(b)(4)(ii)(B). *See Production Workers* at 10.

We need not tarry over the Board's determination that the picketing was an attempt to cause the LCDs and the commissioned drivers to stop doing business with Yellow and Checker;[3] even so characterized, the picketing was "primary" under the Section 8(b)(4) proviso that nothing in the section makes primary picketing unlawful. We vacate and remand the Board's order on that account.

The Board's opinion recognizes that the proviso makes only secondary activity unlawful. *Id.* at 9. It also acknowledges that Section 8(b)(4) is usually dubbed the "secondary boycott provision" and that a secondary boycott is the use of pressure on a neutral, third party in order to gain objectives in a dispute with a different, primary party. Stressing that the term "secondary boycott" appears nowhere in the statutory language, however, the Board maintains that the provision may reach behavior that is not technically a secondary boycott—although presumably the proscribed behavior must still be secondary activity. *Id.* at 6-7. The Board's opinion does not essay an explanation of this distinction between a "secondary boycott" and the presumably broader

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[3] We note a reservation, however, about the Board's conclusion that the picketing at the South Indiana garage was an attempt to cause the commissioned drivers to stop work. The Board seems to acknowledge, as the ALJ found, that the Union believed that the South Indiana garage housed only LCD-operated vehicles. The Board maintains, however, that the Union should have discovered in advance that the garage housed only cabs operated by commissioned drivers. *See Production Workers* at 10. Because we vacate and remand the Board's order on another ground, we do not address this matter.

category of "secondary activity"[4] It does, however, conclude without elaboration and with reference only to two miscited NLRB opinions, *see infra* at 330, that secondary activity includes all picketing on behalf of independent contractors. *Id.* at 9. The Board-tendered blanket rule would thus ban union involvement in picketing by independent contractors not only against neutral parties but also against parties, such as Yellow and Checker, who are directly and intimately involved in the underlying dispute.

Over the years since the adoption of Section 8(b)(4) in 1947, the NLRB has handled a great number of cases delineating the labels "neutral" and "secondary boycott,"[5] but the Board has never before suggested, to the court's knowledge, that Section 8(b)(4) prohibits union participation in picketing against a party regardless of that party's involvement in the underlying issue. We recognize that an agency may change its interpretation of a statute entrusted to its administration, and that when the intent of Congress is unclear courts must uphold the agency's interpreta-

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[4] As noted, the Board apparently believes that a secondary boycott is pressure on a neutral third party, but that secondary activity includes some unspecified class of behavior, including all picketing in aid of independent contractors, that may or may not be directed against a neutral party. As we will explain, *see infra* at 328-330, we find this distinction between a "boycott" and "activity" irrelevant because the quality that makes behavior secondary—whether it be labelled a secondary, boycott or secondary activity—is that it is directed against a neutral party. Moreover, we see no basis in the meaning of the words "boycott" and "picketing" that would account for such differential treatment, for picketing is usually just a means to promote a boycott: "A 'boycott' is a refusal to deal, whether by an employer or a customer (or, more rarely, a seller); a 'strike'—a refusal to work—is then a variety of boycott; 'picketing' is ordinarily an attempt, by means of patrolling at a site with a message of some kind on the picket sign, to instigate a boycott on the part of those seeing the picket." Lesnick, *The Gravamen of the Secondary Boycott*, 62 Col.L.Rev. 1363, 1364 n. 5 (1962). Virtually by definition, then, secondary picketing is picketing initiated to prompt a secondary boycott against a neutral party.

[5] *See generally* R. Dereshinsky, A. Berkowitz, P. Miscimarra, The NLRB and Secondary Boycotts (1981).

tion if it is based on a "reasonable accommodation of conflicting policies." *See Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 2781-83, 81 L.Ed.2d 694 (1984). When the intent of Congress is clear, however, the court must give effect to the intent of Congress regardless of the agency's opinion. *Id.* at 2781-82. *See Securities Industry Association v. Board of Governors of the Federal Reserve System*, 468 U.S. 137, 104 S.Ct. 2979, 2983-92, 82 L.Ed.2d 107 (1984) (holding agency's interpretation of statute inconsistent with congressional intent).

We find the intent of Congress on this issue, as described by definitive, repeated, and unambiguous Supreme Court precedent, altogether clear. Section 8(b)(4) was designed to prohibit only pressure brought to bear on "a third person who is wholly unconcerned in the disagreement," whether that pressure is called a "secondary boycott" or "secondary activity." 93 Cong.Rec. 4198 (1947) (remarks by Senator Taft on Section 8(b)(4)). Moreover, even if the intent of Congress were less than pellucid, the Board's conclusion that Section 8(b)(4) prohibits all union-aided picketing by independent contractors, we believe, would scarcely qualify as a "reasonable accommodation" of the section's policies.

B. The Legislative Meaning of "Secondary"

As originally enacted in 1947 as part of the Taft-Hartley Act, Section 8(b)(4) did not contain the proviso limiting the section's prohibition to non-primary activity. *See* ch. 120, 61 Stat. 140 (1947). The legislative history of the section, however, securely indicates that Congress intended the provision to prohibit only secondary pressure—pressure against neutrals. The Conference Report accompanying the Act specified that the section does not prohibit "the primary strike for recognition." As the Board itself appeared to acknowledge, *see Production Workers* at 6, the report also lists as examples of prohibited conduct only classic secondary boycotts, pressure against a neutral party. H.R.Rep. No. 510, 80th Cong., 1st Sess. 43 (1947), *reprinted in* I Legislative History of the Labor Management Relations Act, 1947 at 505-547 (hereinafter cited as LMRA History). Senator Taft's comments on the floor of the Senate are even more explicit. Noting that under the

Norris-LaGuardia Act secondary boycotts had been wholly lawful, the senator explained: "All this provision of the bill does is to reverse the effect of the law as to secondary boycotts." 93 Cong.Rec. 4198 (1947).

According to this unequivocal legislative history, then, the quality that makes behavior secondary is that it fits the common law definition of secondary boycotts. The classic definition, often quoted by the Supreme Court in connection with Section 8(b)(4), is by Learned Hand: "The gravamen of a secondary boycott is that its sanctions bear, not upon the employer who alone is a party to the dispute, but upon some third party who has no concern in it." *International Brotherhood of Electrical Workers v. NLRB*, 181 F.2d 34, 37 (2d Cir. 1950); *see Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 388, 89 S.Ct. 1109, 1121, 22 L.Ed.2d 344 (1969); *Local 761, International Union of Electrical, Radio & Machine Workers v. NLRB*, 366 U.S. 667, 672, 81 S.Ct. 1285, 1288-89, 6 L.Ed.2d 592 (1960). Professor Cox has incisively expressed the concept: "Historically, a boycott is a refusal to have dealings with an offending person. . . . The element of 'secondary activity' is introduced when there is a refusal to have dealings with one who has dealings with the offending person. . . . Thus, there are two employers in every secondary boycott resulting from a labor dispute." Cox, *The Landrum-Griffin Amendments to the National Labor Relations Act*, 44 MINN.L. REV. 257, 271 (1959). Similarly, the Supreme Court has observed that although the concept "secondary boycott" has "chameleon-like qualities," all common-law commentators "agreed upon its central aspect: pressure tactically directed toward a neutral employer in a labor dispute not his own." *National Woodwork*, 386 U.S. at 623, 87 S.Ct. at 1257; *see also* Hellerstein, *Secondary Boycotts in Labor Disputes*, 47 YALE L.J. 341, 364 (1938).

From its earliest construction of Section 8(b)(4), the Supreme Court has adopted this interpretation. *In NLRB v. Denver Building and Construction Trades Council*, 341 U.S. 675, 71 S.Ct. 943, 95 L.Ed. 1284 (1951), the Court recognized that the original language of the provision would bar virtually all union involvement in picketing, even that specifically protected by other

provisions of the Act. The Court therefore looked instead to the purposes of the provision, observing that the section "often is referred to in the Act's legislative history as one of the Act's 'secondary boycott sections,' " and citing Senator Taft's remark, quoted above, that the provision does no more than make secondary boycotts illegal. *Id.* at 686, 71 S.Ct. at 950. Finally, the Court described the policy behind this prohibition as "shielding unoffending employers and others from pressures in controversies not their own." *Id.* at 692, 71 S.Ct. at 953. For the *Denver Building* Court, then, the quality that makes pressure "secondary" was the same as that reflected in the legislative history: it is brought against a third party not involved in the underlying dispute.

In the 1959 Landrum-Griffin Act, the Congress then sitting gave its implicit imprimatur to the Supreme Court's interpretation by inserting the proviso of present Section 8(b)(4) that explicitly protects primary activity. Since that time, as in the years before, the caselaw has universally and unambiguously held that Congress intended Section 8(b)(4) to protect only neutral parties—and not even all neutrals—from coercion in disputes not their own. *See e.g., NLRB v. Local 825, International Union of Operating Engineers*, 400 U.S. 297, 302-03, 91 S.Ct. 402, 406, 27 L.Ed.2d 398 (1971); *National Woodwork*, 386 U.S. at 623-24, 626-28, 87 S.Ct. at 1257, 1258-59; *Local 1976, United Brotherhood of Carpenters v. NLRB*, 357 U.S. 93, 98, 100, 78 S.Ct. 1011, 1015, 1016, 2 L.Ed.2d 1186 (1958); *United Scenic Artists, Local 829, Brotherhood of Painters and Allied Trades, AFL-CIO v. NLRB*, 762 F.2d 1027, 1033 (D.C.Cir.1985); *Local Union 501, International Brotherhood of Electrical Workers, AFL-CIO v. NLRB*, 756 F.2d 888, 893 (D.C.Cir.1985). The Supreme Court has also repeatedly cited as controlling upon judicial interpretation Senator Taft's remark that Section 8(b)(4) does no more than make secondary boycotts unlawful. *See, e.g., National Woodwork*, 386 U.S. at 624, 87 S.Ct. at 1257; *NLRB v. International Rice Milling Co.*, 381 U.S. 665, 673-74 n. 8, 71 S.Ct. 961, 965-66 n. 8, 95 L.Ed. 1277 (1951); *see also* Levin, *"Wholly Unconcerned": The Scope and Meaning of the Ally Doctrine Under Section 8(b)(4) of the NLRA*, 119 U.PA.L.REV. 283, 283 & n. 3 (1970). Moreover, the Court has repeatedly described Congress' purpose in Section 8(b)(4) as protecting "unoffending

employers," "the helpless victims of quarrels that do not concern them at all."[6] *See, e.g., Edward J. Debartolo Corp. v. NLRB*, 463 U.S. 147, 103 S.Ct. 2926, 2932, 77 L.Ed.2d 535 (1983); *International Longshoremen's Association, AFL-CIO v. Allied International, Inc.*, 456 U.S. 212, 223 n. 20, 225, 102 S.Ct. 1656, 1663 n. 20, 1664, 72 L.Ed.2d 21 (1982) (*ILA*); *National Woodwork*, 386 U.S. at 626-27, 87 S.Ct. at 1258-59.

Thus, we find Congress' intent plain and not subject to genuine dispute: secondary activity under Section 8(b)(4)(B) refers only to pressure on a neutral third party. In contrast to the array of authority supporting this construction of the section, the NLRB offers no apposite authority for its conclusion that secondary activity includes all picketing "on behalf of independent contractors." The NLRB panel opinion relies on two categories of cases. First, by way of background, the panel relies on the Supreme Court's opinion in *ILA*, 456 U.S. at 225, 102 S.Ct. at 1664, for the atmospheric proposition that Section 8(b)(4) is "intentionally broad." *Production Workers* at 5, 7. The cited portion of that opinion, however, explains that the provision's proscription is broad only in that it reaches many forms of secondary boycotts, politically as well as economically motivated ones: "The prohibition was drafted broadly to protect neutral parties, 'the helpless victims of quarrels that do not concern them at all.' [citation omitted]. . . . Recognizing that '[i]llegal boycotts take many forms,' [citation omitted], Congress intended its prohibition to reach broadly." *ILA*, 456 U.S. at 225, 102 S.Ct. at 1664. The *ILA* opinion at no point even intimates that the prohibition is so broad as to reach pressure against non-neutral parties.

Next, the Board panel's opinion inappositely cites two NLRB orders for the proposition that secondary activity includes all picketing on behalf of independent contractors. *See Production Workers* at 9 & n. 23 (*citing Local 814, Teamsters, Chauffeurs, Warehousemen and Helpers of America (Santini Bros.)*, 208 N.L.R.B. 184 (1974); *Local 221, Teamsters, Chauffeurs, Ware-*

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[6] This latter phrase originally appeared in the House Report accompanying the Taft-Hartley Act. *See* H.R.REP. NO. 245, 80th Cong., 1st Sess. 23 (1947), *reprinted in* LMRA History at 314.

housemen and Helpers of America, 222 N.L.R.B. 423 (1976)). These orders, however, involve not picketing on *behalf* of independent contractors but *against* neutral independent contractors. In both, unionized employees of trucking companies attempted to force independent owner-operators—neutral third parties in the dispute between employees and employers—to join the union. The Board correctly held in both cases that such pressure against a neutral violates Section 8(b)(4).

Here on appeal, the NLRB relies principally and inappositely on *NLRB v. Denver Building and Construction Trades Council, supra*. In that case, the Court and the Board found only that a secondary boycott occurred when a union picketed a neutral general contractor in order to cause the general to terminate its contract with the nonunion subcontractor with whom the union's dispute lay. *See id.* at 686-89, 71 S.Ct. at 950-51. Again, the defining feature of "secondary" activity for the Court was that the activity trained pressure against a neutral third party, the general contractor. All of the other cases cited by the Board also fit this pattern. Neither in its brief nor in its order has the NLRB adduced a single case or shred of legislative history supporting the notion that pressure directed against a party who is not neutral can be secondary.[7]

Thus, we harbor no doubt on the critical inquiry in this case: the Board misapprehended Congress' specific intent in concluding that Section 8(b)(4) prohibits union involvement in all picketing by independent contractors. The order under review is therefore invalid. *See Chevron*, 104 S.Ct. at 2781-82 & n. 9.

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[7] Most of the parties' arguments center around whether an independent contractor who has a contract with the party with whom the picketers have a dispute is automatically a neutral. Some precedent in this circuit indicates that such a party is not automatically neutral. *See Carpet, Linoleum, Soft Tile and Resilient Floor Covering Layers, Local Union No. 419 v. NLRB*, 429 F.2d 747 (D.C.Cir.1970). We do not reach that issue, however, because the factual situation before us is different: we have in this case not picketing by employees against a third party related only by contract to the employer of the picketers, but picketing by independent contractors against the very party with whom they have a dispute.

C. Accommodation of Statutory Purposes

If congressional intent were less clear, so that room remained for agency elucidation, we would nonetheless find the Board's definition of "secondary" erroneous. The Supreme Court has instructed us that, absent specific guidance from Congress, the agency's interpretation of a law it administers need only be "based on a permissible construction," one that reflects a "reasonable accommodation of conflicting policies that were committed to the agency's care by the statute." *Id.* at 2782, 2783. This standard, we have stated, requires a reviewing court to determine whether the "interpretation [advanced by the agency] is arguably consistent with the underlying statutory scheme in a substantive sense" and whether the agency's consideration of the issue is adequately reasoned. *Rettig v. Pension Benefit Guaranty Corporation*, 744 F.2d 133, 151 (D.C.Cir.1984). Even under this relatively deferential or relaxed standard, we could not accept as rational the Board's interpretation of Section 8(b)(4)'s compass.

The Board's opinion states that to determine what conduct Section 8(b)(4) proscribes, a tribunal should examine "the problem to which the legislation was addressed." The Board panel then sets out the "dual Congressional objectives" underlying Section 8(b)(4): "preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes"; and "shielding unoffending employers and other from pressures in controversies not their own." *Production Workers* at 7 (quoting *Denver Building*, 341 U.S. at 692, 71 S.Ct. at 953). Next, the opinion notes that assisting independent contractors to picket would not help labor organizations apply pressure to offending employers because no employers or employees would be involved. For this reason, the Board panel declared, the "equations are not balanced in [the Union's] favor." *Id.* at 8. Therefore, for the Union to succeed, the Board required some "strong indication" in caselaw or legislative history that Congress intended "primary" activity to include picketing on behalf of independent contractors. The Board then conclusorily announced that it could find no such indication.

As we have seen, the caselaw and legislative history in fact contain extraordinarily "strong indication" that Congress in-

tended "primary activity" to include all picketing against non-neutral parties, whether by independent contractors or by anyone else, and the panel's failure to find this indication is inexplicable. Aside from this blindspot, moreover, the Board's view that the policy "equations" are "balanced" against the Union appears to us both unreasoned and not in line with the precise policies underlying Section 8b)(4). The Board has entirely ignored the consideration that its order will not advance either of the purposes that it accurately ascribes to the section. The Board panel tells us that assisting independent contractors to picket will not help labor unions to pressure offending employers. But the panel fails to notice as well that forbidding union aid to independent contractors who picket non-neutrals will in no way help to shield neutrals from pressure in controversies not their own. Thus, the Board's whole "balance" metaphor is misplaced, for the "dual Congressional objectives" simply are not in tension in this case.

The Board panel also refers to the general policies of the NLRA, which the Board's opinion describes as promoting "the full flow of commerce," on the one hand, and preserving "the rights of labor to organize," on the other. *Production Workers* at 7. According to the Board, assisting independent contractors to picket would have a "deleterious effect on commerce" but would not help labor to organize because the LCDs are not statutory employees. So, again, the "equations are not balanced in [the Union's] favor." *Id.* at 8.

As the Board itself conceded and we have detailed, however, Congress specified more particular policies for Section 8(b)(4) than simply the background policies of the Act. The Board relies on Section 1 of the Act, 29 U.S.C. § 151 ("Findings and Declaration of Policy"), for its conclusion that Congress sought to promote the flow of commerce. That provision explains that Congress sought to speed the flow of commerce in two specific ways: first by protecting the rights of employees to organize and bargain collectively; and second by prohibiting "certain practices" by unions—*i.e.*, unfair labor practices—that burden commerce. Thus, the Act seeks to aid commerce not by setting up the Board as grand diviner of what will serve that end, but in specific ways through specific provisions with their own specific policies.

This congressional focus on embedding policy in specific provisions is especially keen as regards prohibitions on peaceful picketing, as the Supreme Court has explained: "Throughout the history of federal regulation of labor relations, Congress has consistently refused to prohibit peaceful picketing except where it is used as a means to achieve specific ends which experience has shown are undesirable . . . . We have recognized this congressional practice and have not ascribed to Congress a purpose to outlaw picketing unless 'there is the clearest indication in the legislative history,' [citation omitted], that Congress intended to do so as regards the particular ends of the picketing under review." *NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760*, 377 U.S. 58, 62-63, 84 S.Ct. 1063, 1066, 12 L.Ed.2d 129 (1962); *see NLRB v. Drivers, Chauffeurs, Helpers, Local Union No. 639*, 362 U.S. 274, 284, 80 S.Ct. 706, 712, 4 L.Ed.2d 710 (1960).

As we have already explained, the Board has drawn our attention to no indication in the legislative history of Section 8(b)(4), much less the "clearest indication," that Congress' specific policy regarding secondary activity encompassed prohibition of union involvement in all picketing by independent contractors. Instead, the Board's flawed analysis yielded the contrary and insensible demand that the Union produce "strong indication" that Congress' policy would not abide blanket exclusion of unions from all engagement in picketing by independent contractors. The Board's position, we conclude, does not withstand the test of reasoned decisionmaking.

IV. Conclusion

We hold that the NLRB applied the wrong standard to determine whether the Union's picketing violated Section 8(b)(4), the secondary boycott provision of the NLRA. We therefore remand this case to the Board so that it may apply the correct standard: the section does not exclude union involvement in all picketing by independent contractors; rather, its proscription is limited to picketing against neutral parties.

We offer one further clarification to aid the Board in its task. The Board has argued before us that Yellow and Checker are in fact neutrals because a neutral is anyone not involved in a dispute

between employers and employees. Under this analysis, the cab companies are neutrals because their dispute with the LCDs is not one between employers and employees. *See* Brief for the NLRB at 13-14 n. 5. This stilted interpretation is not the one Congress intended. Nor is it one the Board conceived at the time it rendered its opinion. Then, the Board recognized "clearly" that the factual situation in this case is not one in which the union's activity is directed toward a neutral. *See Production Workers* at 6. As we have already explained, *see supra* at 11-14, a neutral is a third party "wholly unconcerned" in a dispute between two other parties. Yellow and Checker are not at all neutral in this sense; the LCDs' dispute over contract terms lies precisely and only with the cab companies.

In short, then, "we perceive no basis for the Board's decision" because the Board has not "been able to cite any legal authority to support[its] strained new view on the meaning of" secondary activity under Section 8(b)(4). *Teamsters Local Union No. 175, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America v. NLRB*, 788 F.2d 27, 32 (D.C.Cir.1986) (referring to the Board's recent construction of the term "bargaining impasse" under Section 8(a)(5) of the Act, 29 U.S.C. § 158(a)(5)). Congress and the courts long ago clearly established that Section 8(b)(4) bars only pressure against neutrals, and the Board has adduced no remotely tenable argument for its breathtakingly novel interpretation of the provision.[8]

For the reasons stated, we vacate the Board's order and remand this case to the NLRB for proceedings consistent with this opinion.

It is so ordered.

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[8] Our decision does not address, and therefore leaves open, the question whether the union's activity at issue here violates another provision of the Act or is illegal under some other state or federal law. *See supra* 325-326 n. 1 (describing pending proceedings in other fora).

Appendix F

283 NLRB No. 56

United States of America
Before the National Labor Relations Board

Case 13-CC-1159
Case 13-CC-1160

Production Workers Union of Chicago and Vicinity, Local 707; The National Production Workers Union

and

Checker Taxi Company, Inc.
Yellow Cab Company, Inc.

Supplemental Decision and Order

On 14 December 1984 the National Labor Relations Board issued a Decision and Order in this proceeding[1] in which it found that the Respondents violated Section 8(b)(4)(i) and (ii)(B) of the Act by picketing on behalf of independent contractor taxicab drivers who had a dispute with the Charging Parties over the terms of their leases. On a petition for review and a cross-application for enforcement of the Board's Order, the United States Court of Appeals for the District of Columbia Circuit on 13 June 1986 vacated the Board's Order and remanded the case to the Board for further proceedings consistent with the court's opinion.[2]

The Board thereafter accepted the court's remand and notified the parties that they could file statements of position. The General Counsel and the Respondents have filed statements of position.

We have carefully reviewed the record in this case, as well as the statements of position, and, for the reasons discussed below, we have decided to overrule our prior decision in this case and

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[1] 273 NLRB 1178 (1984).

[2] 793 F.2d 323 (D.C. Cir. 1986).

dismiss the complaint. Specifically, we agree with the court's finding that the picketed companies were not neutral parties to the dispute and therefore the Respondents' picketing was primary activity which does not fall within the proscriptions of Section 8(b)(4).

The relevant facts, which are not in dispute, are as follows. Checker Taxi Company and Yellow Cab Company own about 80 percent of the licensed taxicabs in Chicago. Each Company operates both "lease" cabs driven by independent contractors (LCDs)[3] and "commission" cabs driven by union-represented employees.[4] Both Companies operate many more lease cabs than commission cabs.[5] The LCDs lease the cabs for periods ranging from half a day to 1 week, with daily leases being the general practice. Six of Yellow's seven garages house only lease cabs; the remaining garage houses cabs operated by commission drivers. Similarly, Checker maintains four garages with cabs operated exclusively by LCDs and one garage with cabs operated by both LCDs and commission employees.

By 1980 the LCDs had become increasingly dissatisfied with the terms of their leases and began to band together to deal collectively with the Companies under the leadership of an LCD, the Reverend Joseph McAfee. In early July 1980 McAfee consulted with officials of the Respondents, and by the end of the month the Respondents created the "Leased Taxicab Drivers Division" within their organizations. McAfee had enlisted about 1200 of the Companies' approximately 3126 LCDs in his effort, and the Respondents began signing up the LCDs and collecting initiation fees and dues. On 8 August 1980 the Respondents requested the Companies to recognize and bargain with them on behalf of the LCDs, but the Companies refused to do so.

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[3] The lease cab drivers' status as independent contractors was determined in *Seafarers Local 777 v. NLRB*, 603 F.2d 862 (D.C. Cir. 1978).

[4] The commission drivers are represented by Seafarers Local 777.

[5] At the time of the hearing, only 340 of Yellow's 2166 cabs and 200 of Checker's 1500 cabs were operated by commission drivers.

On 12 August 1980 the Respondent and some LCDs began picketing and handbilling at the Companies' garages. Except for one brief incident on the first morning of the picketing, the Respondents and LCDs confined their picketing to garages that housed only cabs operated by LCDs[6] The various picket signs read: "Please do not lease a cab until an agreement is signed regarding your working conditions"; "Lease Cabs on Strike Production Workers Union Local 707"; and "Lease Cab 707 Drivers 707 on Strike Yellow & Checker Taxi Cab Company." The picketing was effective in reducing the number of cabs leased by the LCDs from the Companies, and during the picketing some of the Companies' suppliers refused to make deliveries. There is no evidence that any customer declined to use the Companies' cabs during the picketing.

In its prior decision in this case, the Board observed that in enacting Section 8(b)(4), Congress had the dual objectives "of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own," quoting from *NLRB v. Denver Building Trades Council*, 341 U.S. 675, 692 (1951). The Board held that since the LCDs were independent contractors, the Respondents' efforts on their behalf fell neither within "the rights of labor to organize to better its conditions"[7] nor "the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes."[8]

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[6] On that first morning the Respondents established a picket line at Yellow's garage which houses only employee-operated cabs. Within 30 minutes, a Seafarers Local 777 official went to the garage and advised the Respondents that no lease cabs were operated out of that garage. The Respondents promptly removed their pickets and never resumed picketing at that location. We shall discuss this incident below.

[7] *Allen Bradley Co. v. Electrical Workers IBEW Local 3*, 325 U.S. 797, 806 (1945) quoted in *NLRB v. International Rice Milling Co.*, 341 U.S. 665 fn. 7 (1951).

[8] *Denver Building Trades*, supra at 692.

Further, the Board found no evidence that Congress intended that picketing on behalf of independent contractors is to be considered with the proviso to Section 8(b)(4) protecting primary activity. Accordingly, the Board found that the Respondents' "goal, that of causing the interruption of leases between the [cab companies] and the LCDs, in the absence of a primary labor dispute, was clearly within the scope of the broad proscription of Section 8(b)(4)(ii)(B)."[9] 273 NLRB at 1181.

In addition, the Board concluded that the Respondents' brief picketing at Yellow's garage housing cabs used only by commission drivers violated Section 8(b)(4)(i)(B). The Board stated that there was no evidence that the Respondents could not have learned that no LCDs used the garage before commencing their picketing.

Contrary to the Board, the D.C. Circuit held that Section 8(b)(4) does not prohibit union involvement in all picketing by or on behalf of independent contractors. Instead, the court asserted that Section 8(b)(4) bars only " 'secondary activity': union attempts to involve neutral third parties in disputes not their own."[10] The court determined that the picketing at the LCD garages was not unlawful because it was directed against only the cab companies, who were not neutral parties, but rather were "directly and intimately involved in the underlying dispute." Thus, the court decided that Congress intended "primary activity" to include all picketing against nonneutral parties, whether by independent contractors or by anyone else. The court emphasized that a neutral is a third party "wholly unconcerned" in a dispute between two other parties, and that "Yellow and Checker are not at all neutral in this sense; the LCD's dispute over contract terms

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[9] As a threshold matter, the Board had reversed an administrative law judge's finding that the Board lacked subject matter jurisdiction because the case did not involve statutory employees. The Board stated that it was well established that statutory labor organizations, such as the Respondents, are subject to the proscriptions of Section 8(b)(4) "whether or not their activities concern statutory employees." The D.C. Circuit upheld this aspect of the Board's decision.

[10] 793 F.2d at 327.

lies precisely and only with the cab companies." Accordingly, the court remanded the case to the Board for application of the correct standard, i.e., that Section 8(b)(4) proscribes only picketing against neutral parties.[11]

We now agree with the court's findings that picketing against a neutral party is a necessary predicate to finding a violation of Section 8(b)(4) and that in this case there were no neutral parties subjected to picketing. Although the picket signs appealed to LCDs to cease doing business with the Companies, the picketing was directed against the Companies, which were the only parties with whom the Respondents had a dispute. The picketing occurred only at the cab companies' premises, and the picketing concerned only the Respondents' dispute with the Companies. The Respondents did not appeal to potential customers of the LCDs or to customers or employees of other persons who do business with the Companies. In this regard, we note that we are constrained to accept the court's factual finding that the LCDs were essentially a monolithic group united in a dispute with the Companies and uniform in their definition of their mutual self-interest.[12]

That the dispute here did not concern statutory employees is not determinative of whether the picketing was applied against a neutral party that Section 8(b)(4) is intended to insulate from labor disputes. Thus, the Board's prior decision erred by focusing

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[11] In view of the remand on this ground, the court found it unnecessary to address the Board's finding that the one-time picketing at Yellow's commission drivers' garage violated Sec. 8(b)(4)(i))(B). The court, however, noted a reservation about the Board's conclusion that the picketing at that garage was an attempt to cause the commission drivers to stop work. See infra.

[12] The finding that all the LCDs shared the same interests distinguishes this case from prior cases in which the Board has found unlawful picketing and other pressure directed against neutral independent contractors, rather than engaged in on their behalf. See, e.g., *Teamsters Local 814 (Santini Bros.)*, 208 NLRB 184 (1974), enfd. 546 F.2d 989 (D.C. Cir. 1976), cert. denied 434 U.S. 818 (1977); *Musical Artists (Washington School of Ballet)*, 157 NLRB 735 (1966).

exclusively on the status of the LCDs as nonemployees, and disregarding the nonneutral status of the cab companies. In this respect, we conclude that the following statement by the Supreme Court in *International Rice Milling*, supra, is applicable here:

> By § 13, Congress has made it clear that § 8(b)(4), and all other parts of the Act which otherwise might be read so as to interfere with, impede or diminish the union's traditional right to strike, may be so read only if such interference, impediment or diminution is "specifically provided for" in the Act. . . . No such specific provision in § 8(b)(4) reaches the incident here.[13]

As the Respondents picketed no neutral party in this case, we find that the picketing was primary activity. Accordingly, we overrule our prior decision and find that the Respondents' picketing at the LCD garages did not violate Section 8(b)(4)(ii)(B).

We also reverse our previous finding and dismiss the 8(b)(4)(i)(B) allegation concerning the Respondents' picketing of the Yellow garage housing only cabs operated by the commission drivers. As noted earlier, this conduct occurred on the first morning of the picketing, lasted for at most 30 minutes, and ceased as soon as the pickets were informed that no LCDs were present. Thus, the record indicates that the employee garage was picketed only because the Respondents mistakenly believed that LCDs also used that garage. In these circumstances, we are not persuaded that the General Counsel has shown that this picketing had the necessary forbidden secondary object.[14]

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[13] 341 U.S. at 673.

[14] See *Teamsters Local 100 (Norfolk & Western Railway)*, 187 NLRB 706 (1971).

ORDER

The complaint is dismissed.

Dated, Washington, D.C. 26 March 1987

Wilford W. Johansen, Member

Marshall B. Babson, Member

James M. Stephens, Member

Mary Miller Cracraft, Member

NATIONAL LABOR
RELATIONS BOARD

(SEAL)

(2)

No. 88-15

In the Supreme Court of the United States

OCTOBER TERM, 1988

CHIPMAN FREIGHT SERVICES, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the National Labor Relations Board properly held that a union did not violate the "secondary boycott" provisions of the National Labor Relations Act by picketing petitioner's warehouse facilities on behalf of independent truckdrivers who were seeking the reinstatement of agreements to carry freight that petitioner had cancelled.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A7) is reported at 843 F.2d 1224. The decision and order of the National Labor Relations Board (Pet. App. A8-A13), including the decision of the administrative law judge (Pet. App. A14-A36), is reported at 283 N.L.R.B. No. 57.

JURISDICTION

The judgment of the court of appeals was entered on April 7, 1988. The petition for a writ of certiorari was filed on July 5, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, Chipman Freight Services, transports containerized cargo in and out of its warehouse terminals in Oakland, California, using its own drivers, its customers' drivers, or independent contractors known as "subhaulers." Prior to July 1985, each of petitioner's 22 subhaulers performed work under a uniform agreement that was terminable at will by either party. Petitioner then notified its subhaulers that the agreements had been terminated and that they would have to sign new agreements, with terms the subhaulers viewed as less favorable, in order to continue to transport its freight. Only four of the subhaulers signed new agreements and received further work from petitioner. Pet. App. A9, A17-A18.

At the time that petitioner cancelled the subhaul agreements, the Brotherhood of Teamsters and Auto Truck Drivers, Local 70 of Alameda County (the Union) was engaged in a campaign to organize the independent owner-drivers in the Oakland area. In attempting to regain work from petitioner, some of the subhaulers sought the Union's assistance. On the day after petitioner cancelled the agreements, a Union agent asked petitioner to reinstate the old subhaul agreements and to recognize the Union as the representative of its subhaulers. Petitioner refused to do so. About a week later, most of petitioner's subhaulers met with the Union agent and voted to continue to press for reinstatement of the old agreement and to picket petitioner in support of that demand. The Union agreed to support the picket line until petitioner took back all of the subhaulers under the old agreement, and picketing by the Union began that day. The four subhaulers who had signed new agreements and some of petitioner's customers refused to cross the picket lines. Pet. App. A9-A10.

Petitioner subsequently rejected a renewed request by the Union for recognition on the ground that the sub-

haulers were not its employees, and the Union then stated that, while it "would like to gain recognition," the sole purpose of the picketing was to get the subhaulers back to work under the old agreement. Petitioner thereafter wrote to the individual subhaulers expressing its continuing interest in negotiating new contracts. The Union proposed that the old agreement be reinstated, pending negotiations between petitioner and a committee designated by the subhaulers, in which the Union would not participate. Petitioner replied that it was unwilling to reinstate the old agreement, and would not meet with groups of owner-operators, citing potential antitrust ramifications. Picketing by the Union continued for three months, when it was enjoined by the Ninth Circuit. Pet. App. A10-A11, A22-A23.

2. On a charge filed by petitioner, the Board's Regional Director issued a complaint alleging inter alia that the Union had violated Section 8(b)(4)(i) and (ii)(B) of the National Labor Relations Act (NLRA or the Act), 29 U.S.C. 158(b)(4)(i) and (ii)(B), by picketing petitioner with the object of interrupting the business relations between petitioner and its subhaulers. Pet. App. A12.

The Board, in disagreement with the administrative law judge, determined that the Union had not violated the Act by picketing petitioner's facilities because petitioner "is not a neutral party but is directly and intimately involved in the underlying dispute" (Pet. App. A12). In so holding, the Board relied on its decision of the same date in *Production Workers Local 707* (*Checker Taxi*), 283 N.L.R.B. No. 56 (Mar. 26, 1987), on remand from the District of Columbia Circuit's decision in *Production Workers Local 707* v. *NLRB* (*Checker Taxi*), 793 F.2d 323 (1986).[1] Thus

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[1] In a prior decision, *Production Workers Local 707* (*Checker Taxi*), 273 N.L.R.B. 1178 (1984), the Board found that a union vio-

the Board, finding that "[t]he subhaulers' dispute was solely with Chipman, and the [Union's] picketing on behalf of the subhaulers was directed against Chipman," concluded that the picketing was "primary activity that does not violate Section 8(b)(4)(B) of the Act" (Pet. App. A12-A13).

3. The court of appeals affirmed the Board's decision dismissing the unfair labor practice complaint (Pet. App. A1-A7). The court concurred in the conclusion of the District of Columbia Circuit in *Production Workers Local 707* that "the core distinction between primary and sec-

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lated Section 8(b)(4) by picketing taxicab companies on behalf of the drivers of leased cabs, who were independent contractors rather than employees of the cab companies with whom they were engaged in a dispute as to the terms of their leasing contracts. The court of appeals rejected the Board's premise that Section 8(b)(4) prohibits union involvement in all picketing by or on behalf of independent contractors. It held that Section 8(b)(4) bars only secondary activity, which it defined as "pressure * * * brought against a third party not involved in the underlying dispute" (793 F.2d at 329), and concluded that the cab companies were "not at all neutral" since the "dispute over contract terms lies precisely and only with the cab companies" (*id.* at 333). On remand, the Board agreed with the court of appeals that pressure exerted on a neutral party is a necessary predicate to finding a violation of Section 8(b)(4) and that the cab companies were not neutral parties to the dispute; it determined that the union's "picketing was primary activity which does not fall within the proscriptions of Section 8(b)(4)." 283 N.L.R.B. No. 56 at 5, 6 (Pet. App. A88, A91). The Board further concluded that the fact that the dispute with the cab companies did not concern "employees" as defined by the NLRA "is not determinative of whether the picketing was applied against a neutral party that Section 8(b)(4) is intended to insulate from labor disputes," and that it had erred previously by focusing exclusively on the nonemployee status of the cab drivers and "disregarding the nonneutral status of the cab companies." 283 N.L.R.B. No. 56 at 6 (Pet. App. A91, A92).

ondary activities is the neutrality of the entity against which the disputed activity is directed" (Pet. App. A6). It agreed with the Board that the Union's picketing did not violate Section 8(b)(4) since petitioner "is clearly not a neutral third party, because agreements it attempted to impose upon the independent subhaulers are the sole object of the picketing" (Pet. App. A7).

The court of appeals rejected petitioner's contention that, because it was undertaken on behalf of independent contractors, the Union's picketing was not covered by the proviso to Section 8(b)(4) which privileges primary picketing. The court noted that "section 8(b)(4) nowhere defines a protected primary strike in terms of the employer-employee relation[ship]" (Pet. App. A3). The court acknowledged that independent contractors are not covered by the protections of the NRLA, but said that it does not follow that the Act proscribes union activity on behalf of independent contractors. The court pointed out that Section 13 of the NLRA, 29 U.S.C. 163, which provides that "except as specifically provided" the Act may not be interpreted to limit the right to strike, "makes no reference to limiting its application to the employer-employee relation" (Pet. App. A4).

Similarly, the court rejected petitioner's contention that because a strike is defined in the Labor-Management Relations Act, 29 U.S.C. 142(2), as a "stoppage of work by employees," Section 13 must be read as addressed only to such work stoppages. The court noted that, in the portion of the NLRA containing Section 8(b), a labor dispute is defined as including "any controversy * * * regardless of whether the disputants stand in the proximate relation of employer and employee" (29 U.S.C. 152(9)), which suggests that the drafters of Section 13 intended to allow unions to act on behalf of other parties to labor disputes

"subject to the same general strictures" that apply when they act on behalf of persons who are "employees" under the NLRA (Pet. App. A4-A5).

Finally, the court rejected petitioner's contention that the "touchstone" test of primary activity articulated in *National Woodwork Mfrs. Ass'n* v. *NLRB*, 386 U.S. 612 (1967)—"whether the agreement or its maintenance is addressed to the labor relations of the contracting employer *vis-a-vis* his own employees" (*id.* at 645 (footnote omitted))—establishes that protected primary activity is only activity concerning the wages, hours, or working conditions of employees. The court of appeals, noting that in *National Woodwork* this Court did not consider the impact of its holding "should one of the parties to the dispute not be a statutory employee," concluded that it "would distort" *National Woodwork* to place "undue emphasis on the particular words of the 'touchstone' test [instead of] look[ing] to the basic distinction drawn by *National Woodwork* between a strike against a primary disputant and one against an unoffending neutral" (Pet. App. A5-A6).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or another court of appeals. No further review is warranted.

1. Section 8(b)(4)(ii)(B) of the NLRA prohibits a union from inducing strikes or from threatening, restraining, or coercing any person with an object of "forcing or requiring any person to * * * cease doing business with any other person." It is true, as petitioner asserts (Pet. 6-7), that the Union's conduct here comes within the literal proscription of Section 8(b)(4)(ii)(B) in that it seeks to cause the independent subhaulers and others to cease do-

ing business with petitioner. However, the proviso to 8(b)(4)(ii)(B) excludes from its proscription "where not otherwise unlawful, any primary strike or primary picketing." Section 13 of the Act reinforces that limitation by providing that "[n]othing in [the Act], except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right." "By § 13, Congress has made it clear that § 8(b)(4), and all other parts of the Act which otherwise might be read so as to interfere with, impede or diminish the union's traditional right to strike, may be so read only if such interference, impediment or dimunition is 'specifically provided for' in the Act." *NLRB* v. *International Rice Milling Co.*, 341 U.S. 665, 673 (1951) (footnote omitted); see also *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221, 234-235 (1963).

Indeed, even before the proviso was added to the Act's secondary boycott provisions in 1959, this Court made clear that they "could not be literally applied." *Local 761, Elec. Workers* v. *NLRB*, 366 U.S. 667, 672 (1961). Rather, the dual congressional purposes were to "preserv[e] the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and * * * [to] shield[ ] unoffending employers and others from pressures in controversies not their own." *NLRB* v. *Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 692 (1951). Similarly, in *National Woodwork*, the Court cautioned that although the word "secondary" nowhere appears in the statute, Section 8(b)(4) prohibits only "secondary" activity, and thus is "limited to protecting employers in the position of neutrals between contending parties" (386 U.S. at 625), and protects an employer "only from union pressures designed to involve him in disputes not his own" (*id.* at 626 (footnote omitted)). See also

NLRB v. *Pipefitters*, 429 U.S. 507 (1977).[2]

In this case the independent contractors had a dispute with petitioner over their working conditions, and the Union picketed petitioner on their behalf. Had the Union picketed petitioner in the same circumstances on behalf of

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[2] Petitioner's reliance (Pet. 7) on this Court's reference in *International Longshoremen's Ass'n* v. *Allied Int'l, Inc.*, 456 U.S. 212, 225 (1982), to the plain language of Section 8(b)(4)(ii)(B) is misplaced. In the portion of the opinion from which petitioner selectively quotes, the Court explained that the statutory proscription reaches many forms of boycotts, political as well as economic, and went on to say that the "prohibition was drafted broadly to protect neutral parties, 'the helpless victims of quarrels that do not concern them at all' " (456 U.S. at 225 (citation omitted)). The opinion nowhere suggests that the prohibition is so broadly drawn as to prohibit the picketing of non-neutrals; to the contrary, it makes clear that the statutory prohibition is directed only at "secondary boycotts" and prohibits only coercion of neutrals. *Id.* at 222 n.19, 223 & n.20, 225.

There is no merit to petitioner's additional contentions (Pet. 8, 9) that Section 8(b)(4) "merely codifies" the common law of tortious interference with business relations, and that, read as prohibiting union picketing on behalf of independent contractors regardless of the neutrality of the picketed entity, Section 8(b)(4) is "part of the balance struck by Congress * * * [t]o achieve the ultimate goal of the NLRA—the preservation of the free flow of interstate commerce" (Pet. 9). This Court has consistently reiterated that the congressional purpose in enacting Section 8(b)(4) was to proscribe certain "isolated evils" (*NLRB* v. *Drivers Local 639*, 362 U.S. 274, 284 (1960)), and it has "not ascribed to Congress a purpose to outlaw peaceful picketing unless 'there is the clearest indication in the legislative history' that Congress intended to do so as regards the particular ends of the picketing under review." *NLRB* v. *Fruit & Vegetable Packers & Warehousemen, Local 760*, 377 U.S. 58, 62-63, (1962) (quoting *Drivers Local 639*, 362 U.S. at 284). It has instead repeatedly and invariably held that in enacting Section 8(b)(4) " 'Congress meant [to] reach only secondary pressures.' " *NLRB* v. *International Longshoremen's Ass'n (ILA)*, 473 U.S. 61, 74 (1985) (quoting *National Woodwork*, 386 U.S. at 638); accord *Houston Insulation Contractors Ass'n* v. *NLRB*, 386 U.S. 664, 668 (1967).

petitioner's employees rather than on behalf of independent contractors, there could be no doubt that its action would be deemed lawful primary activity. The Board concluded here only that the nonemployee status of the independent contractors was not controlling as to whether the Union's conduct was lawful primary or unlawful secondary activity. That position, as the court of appeals properly concluded, is a " 'reasonably defensible' " interpretation of the Act (Pet. App. A2, quoting *Ford Motor Co.* v. *NLRB,* 441 U.S. 488, 497 (1979)).

2. There is no merit to petitioner's contention (Pet. 13-14) that the decision in this case conflicts with *NLRB* v. *International Longshoremen's Ass'n,* 473 U.S. at 61, 81 (1985), where the Court, citing *National Woodwork* and *Pipefitters,* looked at whether the union activity at issue sought to affect the relations of an employer vis-a-vis his own employees rather than those of neutral employers. *National Woodwork, Pipefitters,* and *ILA* all involved union efforts to secure work for employees rather than independent contractors and accordingly, in those cases, the Court generally described permitted primary activity as conduct addressed to the relations between the affected employer and "his own employees" (see *National Woodwork,* 386 U.S. at 644, 645; *Pipefitters,* 429 U.S. at 528, 531) or "affecting employees' wages, hours, or working conditions that the employer can control" (*ILA,* 473 U.S. at 81), as distinguished from activity "tactically calculated to satisfy union objectives elsewhere" (*National Woodwork,* 386 U.S. at 644; *Pipefitters,* 429 U.S. at 528; *ILA,* 473 U.S. at 75, 77). However, nothing in those cases suggests that permitted primary activity can be engaged in only on behalf of statutory employees; all three make clear that the necessary predicate for a Section 8(b)(4) violation is union pressure directed towards an uninvolved neutral (386 U.S. at 644-645; 429 U.S. at 511, 523; 473 U.S. 74,

81), and that the determination of whether a union has exerted prohibited secondary pressure must be made in light of all the relevant circumstances (386 U.S. at 644; 429 U.S. at 521-528; 473 U.S. at 81).[3]

Equally flawed is petitioner's contention (Pet. 10-12) that the decision below conflicts with the decision of the Second Circuit in *NLRB* v. *Local 3, IBEW,* 542 F.2d 860 (1976), and that of the Seventh Circuit in *Local 399, IBEW* v. *NLRB,* 601 F.2d 593 (1979), upholding the Board's decisions that governmental entities were neutral parties in certain disputes between unions and private employers despite the fact that the government entities had power to resolve the disputes.[4] Contrary to petitioner's

[3] In *ILA,* the Court observed that "[t]he various linguistic formulae and evidentiary mechanisms we have employed to describe the primary/secondary distinction are not talismanic nor can they substitute for analysis. The inquiry is often an inferential and fact-based one, at times requiring the drawing of lines 'more nice than obvious.' " 473 U.S. at 81 (citation omitted).

[4] In *NLRB* v. *Local 3, IBEW,* Local 3 caused a shutdown of all work at School Board sites to force the School Board to award contracts only to electrical contractors using employees referred by Local 3. The Second Circuit agreed with the Board that Local 3's primary dispute was with the contractors who were using employees referred by another union, and that the School Board was a neutral party entitled to the protection of Section 8(b)(4). In *Local 399, IBEW* v. *NLRB,* the court of appeals enforced, without opinion, the Board's determination that a union violated Section 8(b)(4) by picketing facilities containing equipment leased by Illinois Bell to the State of Illinois to enforce Illinois Bell's agreement with the union that all work on Illinois Bell equipment would be performed by Local 399 members. The Board found that the "Union's dispute with the State was secondary as it had only arisen because of its primary and underlying dispute with Bell Telephone relating to the leasing of [equipment] to the State" (235 N.L.R.B. 555, 559 (1978)), and that the picketing violated Section 8(b)(4) because it was "designed to satisfy [the union's] objectives in its relationship with Illinois Bell" (235 N.L.R.B. at 555).

assertion, the court of appeals here did not rule that the Union's picketing was "primary" simply because of petitioner's "ability to resolve the dispute"; it held that petitioner was not a neutral third party because the dispute underlying the Union's picketing was entirely and only with petitioner. That holding presents no conflict with the cases on which petitioner relies.[5]

3. There is no merit to petitioner's additional contention (Pet. 14-16) that Section 13 of the Act does not apply to picketing on behalf of independent contractors. Nothing in the language of Section 13 limits the right to strike to activity taken on behalf of statutory employees.[6] And, as the court of appeals noted (Pet. App. A4), "circumscription of the scope of the Act's protections is not synon-

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[5] Both of the cited cases involved statutory employees. Accordingly, like this Court in *National Woodwork, Pipefitters,* and *ILA,* the courts of appeals described the primary/secondary dichotomy in terms of employer/employee relationships, but nowhere suggested that Section 8(b)(4) prohibits union picketing on behalf of independent contractors.

[6] Also without merit is petitioner's claim (Pet. 14-16) that Section 13 must be limited to action on behalf of statutory employees because of the language of Section 501(2) of the Labor-Management Relations Act, 29 U.S.C. 142(2), which provides that "[t]he term 'strike' includes any strike * * * by employees." That Section does not provide that *only* activity on behalf of employees shall be considered strike activity and, in any event, as the court of appeals noted, Section 2(9) of the NLRA, 29 U.S.C. 152(9), expressly provides that labor disputes are not limited to those arising in an employee/employer relationship. Petitioner errs (Pet. 15) in contending that *Soft Drink Workers, Local 812* v. *NLRB,* 657 F.2d 1252 (D.C. Cir. 1980), is to the contrary. The court in that case held that the determination of whether union conduct violates Section 8(b)(4) does not turn on the existence of a traditional labor dispute, but on whether the "challenged union conduct * * * [has] as an object forcing or requiring a neutral business to cease doing business with another business" (657 F.2d at 1261), an analysis in accord with that of the court of appeals' decision here.

ymous with an expansion of its prohibitions." Thus, while an employer could not discharge employees who engaged in lawful picketing, it could refuse to contract with independent contractors who engaged in such picketing. It does not follow, however, that because independent contractors are not covered by the protections of the Act, union activity on their behalf is secondary activity within the meaning of Section 8(b)(4) of the Act.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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